TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 310. 62 10.

J. J. DOUGLAS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 25, 1894.

(15,490.)

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(15,490.)

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J. J. DOUGLAS, PLAINTIFF IN ERROR,

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THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1895.

1 COMMONWEALTH OF KENTUCKY:

Pleas.

Pleas before the honorables the judges of the Kentucky court of appeals, at the capitol, in the city of Frankfort, Kentucky, on the 16th day of December, A. D. 1893—Chief Justice Caswell Bennett and Associate Judges William S. Pryor and James H. Hazelrigg presiding.

Caption.

COMMONWEALTH OF KENTUCKY, Appellant,
against
J. J. DOUGLAS, Appellee.

Preamble.

Be it remembered that heretofore, to wit, on the 22nd day of July, 1892, the appellant, The Commonwealth of Kentucky, by Wm. J. Hendrick, attorney general, filed in the office of the clerk of the court of appeals aforesaid a transcript of a record in words and figures following, to wit:

2 STATE OF KENTUCKY,
Jefferson County.

Pleas before the Hon. S. B. Toney, judge of the Louisville law and equity court, at a court held at court-house, in the city of Louisville.

Parties.

THE COMMONWEALTH OF KENTUCKY, Appellant,
against
THE FRANKFORT LOTTERY, J. J. DOUGLAS, OWEN STUART, and C. F. TATUM, Appellees.
} Transcript of Record.

Be it remembered that on the 8th day of March, 1892, plaintiff filed in the clerk's office of the court aforesaid the following petition herein, to wit:

3 *Petition.*

Louisville Law & Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE FRANKFORT LOTTERY, J. J. DOUGLAS, OWEN STUART, and C. F. TATUM, Defendants.
} Petition.

The plaintiff, The Commonwealth of Kentucky, by Wm. J. Hendrick, attorney general for the Commonwealth, states that "by section 18 of an act entitled 'An act to amend and reduce into one the

several acts in relation to the city of Frankfort,' approved March 16th, 1869, it was provided that the board of councilmen of said city shall have the same franchises, power, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city school of the town of Frankfort and for other purposes,' approved February 1st, 1838; that under this act the board of councilmen were authorized to raise, in one or more classes, as to them seemed expedient, by way of lottery, any sum not exceeding one hundred thousand dollars, the money realized to be invested in safe and solvent securities, and the annual interest or profit to be appropriated for the support of the city school of Frankfort. Bond in the penalty of one hundred thousand dollars was to be executed to the Commonwealth for the faithful discharge of the duties imposed by said act, and not more than twenty per cent. of the money
4 taken in was to be reserved by said scheme. By an act approved March 28th, 1872, entitled 'An act amendatory of the laws in relation to the city of Frankfort,' it was provided that the board of councilmen of the city of Frankfort be, and they are hereby, authorized and empowered to grant, bargain, sell, and convey, to rent or lease, any and all property or any part thereof belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises or immunities, on such terms and for such sums and at such times as said board of councilmen shall deem for the best interests of the city of Frankfort."

That by virtue of the authority thus conferred the board of councilmen of Frankfort, on or before Dec. 31st, 1875, disposed of all lottery franchises and privileges conferred by the act of 1869; that the defendants J. J. Douglas, Owen Stuart, and C. F. Tatum are now maintaining, operating, and conducting said lottery under said charter and franchise and claiming the right so to do under and by virtue thereof.

Plaintiff states that on March 22nd, 1890, by the terms of an act entitled "An act to repeal so much of the section 18 of the act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' approved March 16th, 1869, as granted to the board of councilmen of the city of Frankfort the same power and authority as granted to the managers in an act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved Feb. 1st, 1838, and to repeal the amendatory acts in relation to said grants, the General Assembly of
5 the Commonwealth of Kentucky repealed the charter of the Frankfort lottery and an act amendatory of the laws in relation to the city of Frankfort," approved March 28th, 1872.

That by section 235 of the constitution of Kentucky it is provided that—

"Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and no schemes for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

Plaintiff states that the defendants are and have for more than

five months last past been exercising the privileges and franchises granted by the charter aforesaid in the city of Louisville and elsewhere, without lawful warrant, charter, or grant; that they are usurping the right, privilege, and franchise to operate a lottery under said charter, as herein set out, and continue to do so, in contempt of the Commonwealth and against her peace and dignity.

Wherefore plaintiff prays judgment of the court preventing the usurpation of said franchise, and that the defendants be excluded from exercising any and all the privileges and franchises conferred by the acts and provisions herein cited; that the court enforce its judgment by coercive process; for costs and all general and proper relief.

WM. J. HENDRICK,
Attorney General for Commonwealth.
FRANK PARSONS,
Com'th Att'y.

6 Upon said petition filed herein the following summons was issued, to wit:

Summons.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

You are commanded to summon the Frankfort Lottery, J. J. Douglas, Owen Stuart, and C. F. Tatum to answer a petition filed against them in the Louisville law and equity court by the Commonwealth of Kentucky, and warn them that upon their failure to answer within twenty days from the service hereof the petition will be taken for confessed, or they will be proceeded against for contempt; and you will make due return of this summons as soon as executed.

Witness John S. Cain, clerk of said court, this 8 day of March, 1892.

JOHN S. CAIN, *Clerk.*

Upon said summons was made the following return, to wit:

Came to hand M'ch 8th, 1892, at 1 p. m.; executed M'ch 10, 1892, on the Frankfort Lottery by delivering a copy of the within summons to J. J. Douglas, manager of said lottery, he being highest officer in this county at this time; executed M'ch 10, 1892, on J. J. Douglas by delivering him a copy of the within summons; April 9, 1892, on Owen Stuart by delivering to him a copy of the within summons.

H. A. BELL, *S. J. C.*,
By W. B. THIXTON, *D. S.*

7 On the 4th day of April, 1892, the following order was entered herein, to wit:

Ord. Fil. Answer.

Came parties, by counsel, and defendants filed *its* answer and e
hibits herein.

On motion of plaintiff, ordered by the court that this case
passed to 5th inst.

Which answer and exhibits filed herein are as follows:

8

Answer.

Louisville Law and Equity Court.

COMMONWEALTH OF KENTUCKY, Plaintiff, *vs.* THE FRANKFORT LOTTERY, &c., Defendants. } Answer of J. J. Dou las.

1. The defendant J. J. Douglas, for answer to so much of the plai tiff's petition as he is advised it is necessary for him to answer, d nies that he has for more than four months last past or for any perio of time exercised the privileges and franchises granted by the cha ters in petition named without lawful authority. He denies tha he has at any time or place usurped the right, privilege, or fra chise to operate a lottery under the charters referred to in the pet tion, or in any other manner.

2. The defendant J. J. Douglas, for further answer herein, state that he has the legal right to conduct the business, being the owne of the scheme with the right to operate by drawing the classe named in the contract hereinafter set forth, by reason of the follow ing facts:

That the General Assembly of the Commonwealth of Kentucky by an act entitled "An act for the benefit of the city schools in th town of Frankfort, and for other purposes," legally enacted and ap proved by the governor February 1st, 1838, granted to certain per sons named in said act the right to raise by way of lottery in one or more classes as to them might seem expedient a sum no

9 exceeding $100,000, to be appropriated, one half for the use and bene t of the city school in the town of Frankfort, and the other half r the construction of such reservoirs, pipes, and other works tha may be necessary to convey the water from Cove spring to the town of Frankfort; and by section 4 of said act it was provided that the managers of such lottery created by said act "shall be, and they are hereby, authorized to sell and dispose of the scheme or any class or classes of said lottery to any person or per sons who shall enter into bond to the Commonwealth of Kentucky with go d security, with condition well and faithfully to comply with all the terms and provisions of this act; which bond or bonds shall be received by the said managers, and be by them filed in the clerk's office of the Franklin county court before said lottery or any class thereof shall be drawn, &c."

That by an act of the General Assembly of the Commonwealth

of Kentucky entitled "An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes," approved February 16th, 1839, it was provided by section 26 thereof as follows:

"The fourth section of an act entitled, 'An act for the benefit of the city school for the town of Frankfort, and for other purposes,' approved February 1st, 1838, is hereby repealed and it is hereby further enacted that the managers referred to in said act, or their successors, shall be, and are hereby authorized to sell and dispose of the scheme, or any class or classes of the lottery referred to in said act, to any person or persons who shall enter into bond with
10 good security to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said act thus amended, which bond shall be received by said managers, and be by them filed in the clerk's office of the Franklin county court, before said lottery or any class thereof, shall be drawn, and if said bond and security is approved and declared to be sufficient by said county court, and also by the board of trustees of the town of Frankfort, then in such case the managers shall not be individually responsible for any prize or prizes that may be drawn."

That by an act of the General Assembly of Kentucky entitled "An act in relation to the town of Frankfort," approved May 21st, 1861, it was enacted by the General Assembly as follows:

"That so much of the 26th section of an act, entitled 'An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes,' approved February 16th, 1839, as has been repealed by a subsequent act or acts of the General Assembly of this Commonwealth, shall be, and the same is hereby re-enacted, and all subsequent acts revealing the same are hereby repealed."

That by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 16th, 1869, it was provided that the city of Frankfort and
11 its affairs shall be conducted by a board of councilmen to be elected and qualified under the provisions of said act, and by section 18 of said act it was enacted "that the said board of councilmen shall exercise and possess all the powers and privileges which by the general laws of the land in relation to towns and cities are granted to trustees or councilmen. Said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in an act entitled "An act for the benefit of the city schools, and for other purposes," approved February 1st, 1838, and shall invest all the money realized thereunder in safe and solvent securities and may use and appropriate the interest and profits of such investment for the support of the city schools.

That by virtue of the said act the board of councilmen of the city of Frankfort were vested with the lottery franchise named.

That by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act amendatory to the laws of the city of

Frankfort," approved March 28th, 1872, it was enacted by the General Assembly as follows:

"That the board of councilmen of the city of Frankfort be, and they are hereby authorized and empowered, to grant, bargain, sell and convey, to rent or lease any and all property or any part thereof, belonging to the said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises or immunities, on such terms and for such sums, and at such times as said board of
12 councilmen shall deem for the best interest of the said city of Frankfort."

That by virtue of said authority of the State of Kentucky the said board of councilmen of the city of Frankfort did execute and deliver a contract entered into on the 31st day of December, 1875, by and between the mayor and board of councilmen of the city of Frankfort, of the first part, and E. S. Stuart, of the second part, by which contract it was agreed between the parties that whereas under the said acts of the General Assembly of Kentucky the city of Frankfort had the authority to raise by a sale of this said lottery franchise the sum of $100,000; and whereas the said city of Frankfort had devised and published a scheme with sundry classes for the purpose of raising said sum of money; and whereas the said city of Frankfort by the act of March 28th, 1872, was authorized to sell and dispose of said scheme and classes upon such terms and in such manner as the said city of Frankfort might deem proper, the said city of Frankfort did, in consideration of the agreement upon the part of the said E. S. Stewart to enter into a bond with good security to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said acts, and to pay all prizes drawn by any person or persons from time to time in any of the classes aforesaid, according to the provisions of said acts, and that said bond should be received by the city of Frankfort and approved by the county court of Franklin county, the said city of Frankfort, by its mayor
13 and board of councilmen, did sell, convey, and assign unto the said E. S. Stewart the scheme devised by said city of Frankfort under said acts, composed of 30,900 classes, not more than two of which to be drawn each day, Sundays excepted, until the whole number shall have been fully drawn, and the rights to control and operate said scheme in accordance with the provisions of said acts; in consideration of which sale, assignment, and transfer the said E. S. Stewart agreed and promised to pay to the city of Frankfort various sums of money at various times, as stated in said contract; that said contract, which was in writing, signed by the parties thereto, was duly approved, ratified, and confirmed by the general council of the city of Frankfort, which had previously authorized the making thereof. A copy of said contract is filed herewith as a part hereof, marked Exhibit A. A copy of the proceedings of the general council of the city of Frankfort relative to said contract is filed herewith as a part hereof, marked Exhibit B.

Defendant further states that the said E. S. Stewart executed a bond to the Commonwealth of Kentucky, with W. H. Way, R. W.

Meredith, W. de B. Morrill, and W. Scott Glore sureties, in the penal sum of $100,000, in accordance with the provisions of the acts of the General Assembly. Said bond provided that in consideration of the contract stated and the provisions of the acts of the General Assembly referred to the said Stewart, with his sureties, covenanted to faithfully comply with the provisions of the aforesaid acts, and also to pay all sums stipulated in the said contract to be paid to the city of Frankfort, and for the payment of all prizes that might be drawn in any class under said scheme, and the said bond was to be void upon the full compliance upon the part of the said Stewart with all the conditions of said contract. A copy of said bond is filed herewith as a part hereof, marked Exhibit C.

That said bond was received and held sufficient by the city of Frankfort, and said bond was filed in the Franklin county court, approved and held sufficient by the said court, and ordered to be recorded in the clerk's office of said court, as will more fully appear by a copy of the orders of said court upon said subject filed herewith as a part hereof, marked Exhibit D.

Defendant says that by virtue of said contract and premises named the said Stewart became the owner by purchase from the city of Frankfort, under the express authority of the State of Kentucky, of the right to said scheme and to the drawing of said classes of said lottery in accordance with the terms of said contract, which is not yet terminated; that said Stewart died domiciled in the city of Louisville, Jefferson county, Ky.; that by his last will, duly established by an order of the Jefferson county court and recorded in the Jefferson county clerk's office, his wife, Addie B. Stewart, was made sole legatee and devisee of all his estate and became the sole owner of said franchise, scheme, and contract under said will; that this defendant, J. J. Douglas, by a contract in writing, entered into with the said Addie B. Stewart for a valuable consideration, before the time of the passage of the act of the General Assembly of 1890 and of the constitutional provision cited and referred to in the petition herein, acquired the right to operate said scheme by drawing the said classes in said lottery in accordance with the terms of said contract and to the net earnings from the operation thereof, and became vested with the right to conduct, manage, and operate said lottery and to the *new* earnings resulting from the operations thereof, which could not be divested by the said acts of the General Assembly or the constitutional provision in petition referred to.

That the said E. S. Stewart and this defendant have fully complied with all the provisions of said contract, have paid all of the installments due to the city of Frankfort as the same became due and payable, and have in all respects fully performed every condition incumbent upon them under said contract and bond to the city of Frankfort, the Commonwealth of Kentucky, and all other parties therein named, and are ready and willing to fully carry out the same according to the terms, stipulations, and covenants hereof.

Defendant further states that after the execution and delivery of the said contract between the city of Frankfort and the said E. S. Stewart and before the sale, transfer, and contract by which the defendant obtained title to the said property and the right to operate said scheme by drawing said classes in said lottery according to the terms of said contract as above set forth, the Commonwealth of Kentucky,
by her attorney general, instituted an action in the Frank-
16 lin circuit court, which was, upon motion of the Commonwealth
of Kentucky, removed to the Oldham circuit court, and finally decided upon appeal from the judgment of the Oldham circuit court by the court of appeals of Kentucky; that in said action the plaintiff herein claimed that the board of councilmen of the city of Frankfort had made said contract, and that Stewart had purchased said lottery franchise and privileges, and that the defendants in the action, including the said E. S. Stewart, were engaged in selling lottery tickets under and by virtue of said alleged contract, and alleged that the sale by the city of Frankfort and the exercise of the lottery privileges by its vendees was without authority of law and injurious to public morals by tempting the people into the immoral practice of gaming, and that the plaintiff herein in said case alleged and charged that the act of 1869 did not confer upon the city of Frankfort the lottery privileges claimed, and that the act of 1872 did not authorize the sale by the city of Frankfort of the said scheme, and that the said contract of said Stewart was null and void, and the plaintiff herein sought in said action to enjoin and oust the defendants from proceeding further to sell tickets and operate the lottery privileges claimed by them, which are the identical rights, franchises, and privileges claimed herein and sought to be annulled by plaintiff's petition, and the plaintiff herein in said action asked to cancel, annul, and adjudge void the said franchise
and rights claimed by the defendants; that issue was joined
17 upon the said allegations of the plaintiff herein in said action
and a trial had, resulting in a judgment of the Oldham circuit court in favor of the defendants in said action, which was affirmed by the court of appeals of Kentucky on the 27th day of February, 1878, and the said court of appeals of Kentucky upon appeal finally adjudged in said action that the General Assembly of Kentucky, by the act of March 18th, 1869, did confer upon the board of councilmen of the city of Frankfort the said lottery franchise, and that the city of Frankfort was the owner thereof under said act, and that under the act of March 28th, 1872, the said city of Frankfort had the legal right to sell and dispose of the same upon such terms and conditions as it deemed proper, and that said act was constitutional and valid, and that the said sale was valid, and that the contract named and described herein between the said Stewart and the city of Frankfort was a valid and binding obligation, entered into in strict conformity with the said acts of the General Assembly and enforceable as such; that on the 11th day of September, 1878, the court of appeals of Kentucky in the case of J. N. Webb *vs.* The Commonwealth of Kentucky, in an action filed by the Commonwealth of Kentucky, in the nature of a writ of *quo*

warranto, to enjoin the appellants in said action from exercising the privileges of a lottery grant, adjudged that the sale of a lottery franchise under the authority of the State vested in the vendee a property right to conduct such lottery in accordance with the terms of his contract, which could not be repealed by the
18 legislature of the State, and held *that* section 6 of article 21, chapter 28, of the Revised Statutes, which attempts such repeal, void as far as it affected the rights of the purchaser under a contract before the passage of the act.

Defendant says that he has a vested right to conduct the lottery business by drawing the classes contained in the scheme which the city of Frankfort sold and conveyed to E. S. Stewart under the terms, conditions, and covenants of the contract of December 31st, 1875, executed and delivered as aforesaid, and that there has never been at any time more than two classes in said scheme drawn in one day, and there are a large number of classes in said scheme yet to be drawn: that his said right under his said contract *were* authorized and approved by the Commonwealth of Kentucky, repeatedly adjudged valid by the judicial tribunals of this State, and such right has always been held by the courts of this State inviolable and not subject to repeal, alteration, or modification by subsequent legislatures.

Defendant says that he has paid large sums of money for said scheme devised as aforesaid and said contract, and has made contracts and incurred liabilities involving large sums of money upon the faith of said contract, and relying upon the terms thereof and upon the decisions of the courts of the State adjudging said contract to be valid, obligatory, and inviolable.

Defendant says that the said franchises named in the peti-
19 tion and the contracts for the sale of the same having been held valid, subsisting, and irrepealable by the court of appeals of Kentucky, the General Assembly of the Commonwealth of Kentucky, recognizing the correctness of such decisions, did, on the 7th of May, 1886, enact the following law:

"Every corporation or person to whom a lottery franchise has been granted by the General Assembly of this Commonwealth, and which franchise has been declared by a judgment of the court of appeals to be a lawful and existing one, or the lawful grantee, licence, legatee or assignee of such franchise, shall be authorized to operate and conduct a lottery in this Commonwealth when he, she, or it, shall have filed with the auditor of public accounts a certified copy of the judgment rendered, and the opinion delivered by the court of appeals in a case heard and determined before it, in which has determined that a lottery could be lawfully operated under said grant from the General Assembly of this Commonwealth, and obtain from the said auditor a license (which is hereby authorized and directed to issue on the filing of said copies hereinbefore required) reciting the filing of said copies, and authorizing the operation of said lottery for one year from the date thereof, on the condition that said license shall, within five days thereafter, pay to the said auditor of the State the sum of $2,000; and said license issued

thereof, as hereinafter provided for, shall be conclusive evidence in all the courts of this Commonwealth of the rights of the licensee to operate a lottery for the period therein named, &c."

20 By the said act the General Assembly of the State recognized the validity of the said contracts, and that they were not subject to repeal, as held by the court of appeals of Kentucky, and imposed a tax upon the same and fixed such tax at $2,000 per annum for each lottery whose franchise had been declared by a judgment of the court of appeals to be a live and existing one, and did by said act authorize said owner to operate and conduct a lottery in this Commonwealth for the period named in the license.

This defendant filed a copy of the opinion of the court of appeals rendered in the case of The Commonwealth *vs.* The City of Frankfort, &c., aforesaid with the auditor of public accounts, and did obtain from him a license year by year in accordance with said law, and this defendant has paid the State of Kentucky $2,000 annually each and every year since the passage of said act for carrying on the business under the contract stated and now complained of herein.

And the General Assembly of Kentucky, further recognizing the property rights of this defendant under his said contract, by an act of the General Assembly of the State approved May 12th, 1884, enacted that the general council of the city of Louisville should by ordinance provide for the payment of $200 per annum for every lottery office or agency therefor in the city of Louisville, which ordinance was accordingly passed by the general council of the city of Louisville and is now a valid and existing law, and this defendant has paid the city of Louisville $200 for each office oper-

21 ated by him, and at the time of the institution of this suit had paid the city of Louisville the sum of $200 for each office he then operated in advance for one year from the time of the issue of the license, and that the said licenses thus obtained have not yet expired.

The defendant says that the matters complained of in the petition have been adjudged against the plaintiff herein by court of appeals of Kentucky, and by numerous decisions of the judicial tribunals of the State the rights of the defendant herein under said contract have been fixed and determined; that the judicial department of Kentucky has uniformly, without interruption, for a series of years held and adjudged that a contract relative to a lottery franchise such as the defendant has vested in him an irrepealable right of property under a contract under the laws of this State, and has expressly so held relative to the contract under which the defendant claims; that all of the departments of the State government and of the municipal government of the city of Louisville have acquiesced at all times in such construction and acted upon it and have received large sums of money from the defendant for governmental purposes, both State and municipal, based upon such construction of the contract; that he, relying upon the decision of the courts of the State and the contemporaneous construction always given to

his said contract and contracts of the same character, made the contracts referred to and expended large sums of money and
22 has incurred liabilities to a large extent relative to the management of the said franchise and contract.

Defendant says that by reason of the premises he has a right of property lawfully vested in him under the said contract to said scheme and the drawing of the classes named in said contract, which still exist, and that the acts of 1890 referred to in the petition herein and the constitutional provision referred to in the petition are void and of no effect, so far as this defendant and his rights are concerned; that said acts and constitutional provisions are in violation of the constitution of Kentucky, in existence at the time he made his contract and acquired his rights, by which constitution it was provided that "no law impairing contracts shall be made," and also in violation of the present constitution of Kentucky, which provides "that no law impairing the obligation of contracts shall be enacted," and in violation of the Constitution of the United States, which provides that no State shall pass a law impairing the obligation of contracts, and are therefore null and void, as they seek to impair and nullify a contract made by this defendant and those under whom he claims, under the express authority of the State, ratified and confirmed by the State, and adjudged valid and irrepealable by the courts of the State, and sanctioned for a series of years by all the departments of our Government.

3. The defendant further states that after the making of the contract between the city of Frankfort and said S. S. Stewart, as
23 set forth in the second paragraph hereof, the Commonwealth of Kentucky, by her attorney general, filed a petition in the Franklin circuit court against the city of Frankfort, the said E. S. Stewart, and others, in the nature of a writ of *quo warranto*, alleging in said petition that the said E. S. Stewart and others claiming under him were selling lottery tickets under the said grant, claiming under the contract referred to in the second paragraph herein; and further alleged that the said board of councilmen of the city of Frankfort had no title to said lottery franchise and had no authority to sell and convey the scheme as set forth in said contract, and that the defendants in said action were engaged in selling tickets under said contract in violation of law, and that the exercise of the privileges by them was injurious to public morals by tempting the people into the immoral habit of gaming, and that the said defendants were usurping the franchise, all of which matters and things are now relied upon in this action and are the identical matters for which relief is sought in this case, and that by the said petition the plaintiffs herein sought in said action to enjoin and oust the defendant therein from proceeding further to sell tickets and operate the lottery privileges claimed by them, which are the identical rights claimed herein, and the court was asked to hold the said franchise void and to annul and adjudge as cancelled all rights of the defendants therein; that said defendants filed their answer in said case and joined
issue upon the allegations of the said petition; that
4 thereafter, upon motion of the Commonwealth of Kentucky,

the said action was transferred from the Franklin circuit court to the Oldham circuit court; that in the said case such proceedings were had that the court finally entered a judgment adjudging that under the act of March 16th, 1869, referred to in paragraph 2 hereof, the city of Frankfort and the board of councilmea of said city did obtain the legal title to said lottery franchise and the classes thereof; and, further, that the said city of Frankfort, under the act of March 28th, 1872, referred to in paragraph 2, were authorized to sell and dispose of said scheme upon such terms as they deemed proper, and that said act was constitutionally valid and binding and authorized such sale and transfer, and that the contract made between the city of Frankfort and the said E. S. Stewart, which is the same contract relied upon herein, was a valid and subsisting obligation and enforceable as a legal obligation. From said judgment of the Oldham circuit court the Commonwealth of Kentucky prayed an appeal to the court of appeals of Kentucky, and the said court of appeals of Kentucky, on the 27th day of February, 1878, entered a judgment affirming the judgment of the Oldham circuit court, and adjudged in said action that the General Assembly of the Commonwealth of Kentucky, by the act of March 16th, 1869, did confer upon the board of councilmen of the city of Frankfort the said lottery franchise, and that the said act was valid, and that the city of Frankfort, by reason thereof, was the owner of the scheme named in the contract referred
25 to, and that under the act of March 28th, 1872, the city of Frankfort had the legal right to sell and dispose of the same upon such terms and conditions as it deemed proper, and that the said sale to the said E. S. Stewart and the contract in relation thereto was valid and binding and had been entered into in strict conformity with the said acts of the General Assembly. A copy of the pleadings in said case and the opinions and judgments of said courts will be filed herewith as a part hereof. The defendant says that by reason of the proceedings in said action and the judgment of the courts thereupon the plaintiff is barred from bringing or maintaining this action; that the legality of the act of March 28th, 1872, and the validity of the contract of E. S. Stewart with the city of Frankfort are matters *res judicata* by reason of said judgment, and he pleads and relies upon the same herein.

Wherefore the defendant prays that the petition of the plaintiff be dismissed, and for all proper relief.

J. G. CARLISLE,
D. W. SANDERS,
MUIR, HEYMAN & MUIR,
KOHN, BAIRD & SPEKERT,
Att'ys for Def't.

26 *Exh. with Answer, Minutes City Council Frankfort.*

Extract from the minutes of the city council of Frankfort, Ky., December 31st, 1875.

Councilman Lindsay offered the following, which was adopted:

Whereas by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort" approved March 16th, 1869, and an act of the General Assembly of the Commonwealth of Kentucky entitled "An act amendatory of the laws in relation to the city of Frankfort" approved March 28th, 1872, this board has the authority to devise and publish a scheme with sundry classes for the purpose of raising by way of lottery the sum of one hundred thousand dollars: Now be it resolved by the mayor and board of councilmen of the city of Frankfort that they do devise and publish the following scheme and classes for said purpose, to wit:

Frankfort lottery of Kentucky.

Scheme.

To raise by way of lottery the sum of one hundred thousand dollars, the amount authorized to be raised by an act of the General Assembly of the Commonwealth of Kentucky entitled, "An act to amend and reduce into one the several acts in relation to the city of Frankfort approved March 16, 1869, which lottery is to be drawn according to said act, and also the act of the same legislature entitled "An act for the benefit of the city school of the town
27 of Frankfort and for other purposes approved February 1st, 1838. This scheme shall be composed of thirty thousand nine hundred classes, not more than two of which shall be drawn on the same day, but may be drawn on successive days (Sundays excepted) until the whole number shall have been fully drawn.

The prizes in the respective classes may vary in amount from one hundred thousand dollars to twenty-five cents. No one capital prize in any one class shall exceed one hundred thousand dollars in amount and the number of prizes in any one class shall not exceed seventy-six (76) thousand and seventy-six (76). The number of tickets in each class may vary from seventy-six thousand and seventy-six to thirty-four thousand two hundred and twenty, according to the number and amounts of the prizes contained in the respective classes. The price of tickets may be made to vary according to the number and amount of the prizes contained in each class and the composition thereof. The classes shall be drawn with 78 or 75 or 66 or 60 numbers as the case may be and the numbers to be drawn from the wheel may vary from five to twenty. The said classes shall be drawn upon the ternary system, and fifteen

per cent. shall be deducted from all prizes sold in any of the said classes.

Frankfort, Ky., this 31st day of December, 1875.

EDMUND H. TAYLOR, JR., *Mayor.*

CHAS. HAYDON,
Clerk of City Council.

And for authenticity thereof that the same may be signed
28 by the mayor of the city of Frankfort and countersigned by the clerk.

Councilman Lindsey, in compliance with resolution employing him to draw up contract with E. S. Stewart for lottery grant, reported that he had drawn up said contract and submitted the same to the board for their approval.

Ordered that, in consideration of the first payment of $1,750.00 having been made, the mayor is directed to execute the contract, which is approved by this board on behalf of the city; and Mr. E. S. Stewart being present, thereupon said contract was executed by him and his honor the mayor and attested by the clerk in the presence of this board, and which contract reads as follows:

This article of agreement made and entered into this 31 day of December 1875 by and between the mayor and board of councilmen of the city of Frankfort of the first part and E. S. Stewart of the second part, witnesseth, that whereas it is believed that by virtue of the eighteenth section of an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort."

Approved March 16th, 1869, and an act of the General Assembly of the Commonwealth of Kentucky entitled "An act amendatory of the laws in relation to the city of Frankfort," approved March 28th, 1872, the parties of the first part have the authority to raise by way of lottery the sum of one hundred thousand dollars; and
29 whereas the parties of the first part have pursuant to said acts and the authority alleged to be thereby conferred devised and published a scheme with sundry classes for the purpose of raising by way of lottery the said sum of money which scheme with the classes read as follows, to wit:

Frankfort lottery of Kentucky.

Scheme.

To raise by way of lottery the sum of one hundred thousand dollars, the amount authorized to be raised by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 16, 1869, which lottery is to be drawn according to said act, and also an act of the same legislature entitled "An act for the benefit of the city school of the town of Frankfort and for other purposes," approved February 1, 1838.

This scheme shall be composed of thirty thousand nine hundred classes not more than two of which shall be drawn on the same day, but may be drawn on successive days, (Sundays excepted) until the whole number shall have been fully drawn. The prizes in the respective classes may vary in amount from one hundred thousand dollars to twenty-five cents. No one capital prize in any one class shall exceed one hundred thousand dollars in amount, and the number of prizes in any one class shall not exceed seventy-six (76) thousand and seventy-six (76). The number of tickets in each class may vary from seventy-six thousand and seventy-six to
30 thirty-four thousand two hundred and twenty according to the number and amounts of the prizes contained in the respective classes. The price of tickets may be made to vary according to the numbers and amounts of the prizes contained in each class and the composition thereof. The classes shall be drawn with 78 or 75 or 66 or 60 numbers as the case may be and the numbers to be drawn from the wheel may vary from five to twenty. The said classes shall be drawn upon the ternary system and fifteen per cent. shall be deducted from all prizes sold in any of the said classes.

Frankfort, Ky., this 31st day of December, 1875.

E. H. TAYLOR, JR.,
Mayor of the City of Frankfort.

CHAS. HAYDON,
Clerk of City Council.

And whereas by the eighteenth section of said act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort" approved March 16, 1869, the act entitled "An act for the benefit of the city school of the town of Frankfort and for other purposes," approved February 1, 1838, and the act entitled "An act amendatory of the laws in relation to the city of Frankfort," approved March 28, 1872, the parties of the first part are authorized to sell and dispose of the scheme or any class or classes of said lottery to any person or persons who shall enter into bond with good security to the Commonwealth of Kentucky with condition well and faithfully to comply with all the terms and provisions of the said acts hereinbefore named and specified to
31 pay all prizes drawn by any person or persons from time to time in any of the classes aforesaid according to the provisions of said acts as hereinbefore named and specified which bond shall be received by the parties of the first part and be by them filed in the clerk's office of the Franklin county court before the lottery or any class thereof shall be drawn, and if said bond and security is approved and declared to be sufficient by the said county court and also by the board of council of Frankfort then and in such case the parties of the first part shall not be responsible for any prize or prizes that may be drawn. Now the parties of the first part have this day and do by these presents sell unto the party of the second part the scheme and classes aforesaid to him his heirs

hereby authorize the said party of the secon
part his heirs and assigns to draw said lottery under said schem
and classes as fully and to all intents and purposes as the parties
the first part are authorized or empowered to do by the provisio
of the said acts hereinbefore named and specified provided alwa
that the party of the second part his heirs and assigns in drawin
the classes of said lottery shall in all respects draw the same a
cording to and in conformity with the provisions of the said ac
aforesaid and according to the *principals* laid down in the schem
and classes aforesaid. In consideration of which the party of th
second part binds himself his heirs executors, administrators an
assigns to pay to the parties of the first part the following sums
money at the following times to wit:

32 $1,750 cash in hand on the execution of this contrac
which is hereby acknowledged to have been paid.
$1,750 on the first day of April, 1876.
$1,750 on the first day of July, 1876.
$1,750 on the first day of October, 1876.
$1,750 on the first day of January, 1877.
$1,750 on the first day of April, 1877.
$1,750 on the first day of July, 1877.
$1,750 on the first day of October, 1877.
$1,750 on the first day of January, 1878.
$1,750 on the first day of April, 1878.
$1,750 on the first day of July, 1878.
$1,750 on the first day of October, 1878.
$1,750 on the first day of January, 1879.
$1,750 on the first day of April, 1879.
$1,750 on the first day of July, 1879.
$1,750 on the first day of October, 1879.
$1,750 on the first day of January, 1880.
$1,750 on the first day of April, 1880.
$1,750 on the first day of July, 1880.
$1,750 on the first day of October, 1880.
$2,500 on the first day of January, 1881.
$2,500 on the first day of April, 1881.
$2,500 on the first day of July, 1881.
$2,500 on the first day of October, 1881.
$2,500 on the first day of January, 1882.
$2,500 on the first day of April, 1882.
33 $2,500 on the first day of July, 1882.
$2,500 on the first day of October, 1882.
$2,500 on the first day of January, 1883.
$2,500 on the first day of April, 1883.
$2,500 on the first day of July, 1883.
$2,500 on the first day of October, 1883.
$2,500 on the first day of January, 1884.
$2,500 on the first day of April, 1884.
$2,500 on the first day of July, 1884.
$2,500 on the first day of October, 1884.
$2,500 on the first day of January, 1885.

$2,500 on the first day of April, 1885.
$2,500 on the first day of July, 1885.
$2,500 on the first day of October, 1885.
$1,875 on the first day of January, 1886.
$1,875 on the first day of April, 1886.
$1,875 on the first day of July, 1886.
$1,875 on the first day of October, 1886.
$1,250 on the first day of January, 1887.
$1,250 on the first day of April, 1887.
$1,250 on the first day of July, 1887.
$1,250 on the first day of October, 1887.
$1,250 on the first day of April, 1926, and
$1,250 on the 31st day of December, 1926.

Said several installments shall be paid as they respectively fall due without any rebate discount or deductions whatever, on any thereof for any interference as hereinafter mentioned which may occur after such instalment or instalments have been paid or become due to the treasurer of the city of Frankfort, and his receipt therefor countersigned by the clerk of the city of Frankfort shall be good and sufficient evidence of any and all payments. It is agreed however that in the event the said party of the second part his heirs or assigns are at any time prevented or hindered from drawing said lottery or any class or classes thereof in this State by judicial or legislative proceedings, he shall not be required to pay any instalment or instalments, falling due during the time in which he may be so prevented or hindered until such prevention or hindrance is removed. Provided that the party of the second part shall by notice in writing served upon the mayor of the city of Frankfort notify the parties of the first part of the date of the commencement of any such interference when the time of the computing of the interference shall commence from the date of said service of such notice and continue only so long as such prevention or hindrance as aforesaid shall actually exist. And it shall be the duty of the party of the second part to notify in writing the parties of the first part of the removal or cessation of such prevention or hindrance immediately thereon, and provided further in case of any such interference as aforesaid the actual time of duration of such hindrance or prevention shall not be computed in the drawings of the classes aforesaid, if no such drawings are in fact made during said time and all of the said payments hereinbefore enumerated which shall fall due after the commencement of such interferences shall be respectively postponed for the same length of time of said interference and become due and payable accordingly.

It is further agreed that in the event the party of the second part, his heirs, assigns, or representative shall for the space of thirty days after any of said instalments shall become due fail to pay the same, the parties of the first part shall have the power at their discretion to declare this contract at an end and cancel the same by notice to the party of the second part but such cancellation shall

not deprive the parties of the first part of their right under this co
tract to collect any and all of said instalments then or past due.

It is further agreed that the party of the second part his heirs a
signs or personal representatives shall have the right to draw th
whole number of the classes provided for in said scheme unless thi
contract be cancelled as aforesaid it being the intention that th
party of the second part has purchased the entire scheme and al
the classes thereof, subject to the restrictions and qualification
herein contained, to be drawn by him upon the principles an
within the limitations prescribed in the scheme and the acts of th
legislature aforesaid. Provided however and it is expressly under
stood that nothing herein contained shall be construed as a guar
antee on the part of the parties of the first part of the validity o
the lottery grant herein mentioned and referred to or as to the cor
rectness of the said scheme and classes under the acts men-
36 tioned and specified, or as to their power to dispose of said
scheme and classes.

It is further understood and the party of the second part
hereby agrees and binds himself his heirs, assigns and personal
representatives to pay all the prizes drawn by any person or persons
from time to time in any of the classes aforesaid according to the
provisions of the said acts hereinbefore named and specified. The
party of the second part hereby agrees for himself, his executors,
administrators and heirs that should he make any assignment of
this contract then in that event he and any and all assignees under
him shall give notice thereof to the party of the first part by filing
a copy of said assignment with the clerk of the city council of the
city of Frankfort.

It is further agreed that if at any time it becomes necessary that
this contract shall be amended so as to secure to each party their
rights under the same according to the intent of this contract the
parties hereto agree and bind themselves to do so.

In witness whereof the parties hereto have subscribed their names
at this Frankfort Kentucky the day and date above written, the
marginal note on the tenth (10th) page commencing with the word
"and" and ending with the word "accordingly" inserted before
the signing hereof.

E. S. STEWART.
EDMUND H. TAYLOR, JR., *Mayor.*

Attest: CHAS. HAYDON, *City Clerk.*

37 CITY OF FRANKFORT:

OFFICE OF CITY CLERK.

I, Chas. G. Payne, clerk of the board of councilmen of the city of
Frankfort, do hereby certify that the above and foregoing is a true
and correct copy of the contract between the city of Frankfort and
E. S. Stewart as appears on the minute book of the said council now
on file in my office.

In testimony whereof I hereto sign my name and cause the seal

of the city of Frankfort to be attached thereto. Done at
[SEAL.] Frankfort this 10th day of March, A. D. 1892.

CHAS. G. PAYNE, *City Clerk.*

38

Bond.

Bond of the Frankfort Lottery Company.

"Know all men by these presents that we, E. S. Stewart, principal, and W. H. Way, R. W. Meredith, and W. de B. Morrill, sureties are held and firmly bound to the Commonwealth of Kentucky, in the penal sum of one hundred thousand ($100,000) dollars, to be paid to the said Commonwealth for the payment of which well and truly to be made, we, and each of us, bind ourselves, our heirs, executors and administrators firmly by these presents, dated this 31st day of December, in the year A. D. 1875.

"The condition of the above obligation is such that, whereas, by certain acts of the General Assembly of the Commonwealth of Kentucky, viz: one act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' Session Acts 1869, vol. 2, chap. 2, 167, sec. 18 act 1869 approved the 16th day of March, 1869, and an act entitled 'An act amendatory to the laws in relation to the city of Frankfort,' approved March 28, 1872, chapter 889, Session Acts of 1871–'2, vol. 2, page 393, and certain acts and amendments of acts therein referred to, the board of councilmen of the city of Frankfort were authorized by way of lottery, in one or more classes, to raise any sum not exceeding one hundred thousand dollars, and to sell and dispose of the scheme or any class or classes of the lottery referred to in said acts to
39 any person or persons, who shall enter into bond with good security to the Commonwealth of Kentucky with condition well and faithfully to comply with all the terms and provisions of said acts and amendments.

"And, whereas, said board of councilmen did on the 31st day of December, 1875, devise a scheme under which (30,900) thirty thousand and nine hundred classes should be drawn under said lottery grant, for the purpose of raising one hundred thousand ($100,000.00) dollars, authorized to be raised by said above-mentioned acts of the General Assembly of the Commonwealth of Kentucky, and also other acts therein referred to.

"And whereas, the said board of councilmen of the city of Frankfort, on the 31st, day of December, 1875, did sell and transfer unto E. S. Stewart, his heirs, executors, administrators and assigns, the scheme aforesaid and all the classes thereof and pertaining thereto, and the exclusive right to draw the same and conduct the drawing of any and all classes of said scheme during the period to be begun and ended as in said agreement of sale and transfer, are fully written and set out, that is, until the whole number of said classes shall have been drawn or until the sum of one hundred thousand ($100,000.00) dollars shall have been raised for the purposes mentioned in said scheme and the acts first above mentioned.

"And, whereas, the said E. S. Stewart, as by said articles of agreement between him and said board of councilmen will more
40 fully appear, is required, before he shall begin — draw any classes in said scheme set out and mentioned, or exercise any right or power conferred on them by the articles, to execute a bond to the Commonwealth of Kentucky, with good and sufficient surety in the penal sum of one hundred thousand ($100,000.00) dollars, conditioned well and faithfully to comply with all the terms and provisions of the aforesaid acts, and also for the payment of the sums stipulated to be paid in said contract, and for the payment of all prizes that may be drawn in any class under said scheme, and of all other expenses that he may be subject to as the vendor of said scheme.

"Now, therefore, if the said E. S. Stewart shall well and faithfully comply with all the terms and provisions of said acts of the General Assembly of the Commonwealth of Kentucky and shall well and truly perform all the covenants upon him binding in said contract and agreement before mentioned, and shall pay to said board of councilmen of the city of Frankfort and their successors the sums in said agreement set out as to be paid by him to said board of councilmen at the several times and in the manner therein mentioned, and shall pay any and all prizes that may be drawn in any and all classes under said scheme, in said agreement mentioned, during the existence thereof, and all expenses and charges of every kind that may accrue in the management of said scheme during the existence of the said above-named agreement, without subjecting the above-mentioned board of councilmen or their successors to any responsibility for any part of the above-named charges and
41 expenses, whether for the payment of prizes or any other expenses of any other name or nature arising during the existence of said agreement. Upon the full compliance with the above conditions by the said E. S. Stewart, then this obligation shall be void and of no effect, otherwise, to be and remain in full force, virtue and effect.

"In witness whereof we have hereunto set our hands and seals, this 31st day of December, A. D. 1875.

"E. S. STEWART. [L. S.]
"W. H. WAY. [L. S.]
"R. W. MEREDITH. [L. S.]
"W. DE B. MORRILL. [L. S.]
"W. SCOTT GLORE, [L. S.]
"By A. DUVALL,
His Attorney-in-fact."

Franklin County Court.

MONDAY, *May* 20, 1876.

This day came Chas. Haydon, clerk of the board of councilmen of the city of Frankfort, Kentucky, and filed the following papers, viz: consent of W. de B. Morrill and R. W. Meredith, of date May 18, 1876, relating to the substitution of W. Scott Glore

as security of E. S. Stewart on his lottery bond, of date December 31, 1875, in lieu of W. H. Way; the affidavits of W. Scott Glore and F. R. Bishop as to the sufficiency of said Glore as security, and a power of attorney from said Glore to A. Duvall authorizing and empowering said Duvall, as his attorney-in-fact, to sign,
42 execute, and acknowledge said bond as such security, and asked that the same, together with said bond, when so executed, be ordered to record in the clerk's office of this court, which is done; and thereupon came Alvin Duvall, attorney for E. S. Stewart, the principal in said bond, and W. H. Way, one of the securities therein, and moved the court to be allowed to withdraw the name of said Way as security on said bond and to substitute W. Scott Glore as security thereto in lieu of said Way, and produced the order of the board of council of the city of Frankfort, Kentucky, consenting to such change, provided the same be approved by this court; and such motion, being heard, is sustained, and therefore A. Duvall, in open court, as the attorney-in-fact for said W. Scott Glore and in his name, signed, executed, and acknowledged said bond as security as aforesaid.

A copy.

(Attest:)

JAS. G. CROCKETT, *C. F. C. C.*,
By HOWARD JETT, *D. C.*

43 The following are the two decisions of the court of appeals of Kentucky referred to in the foregoing statement:

Opinion Court of Appeals.

Kentucky Court of Appeals.

FRANKFORT, *February* 27, 1878.

COMMONWEALTH OF KENTUCKY
vs.
CITY OF FRANKFORT, &c. } Oldham.

Judge ELLIOTT delivered the opinion of the court as follows:

In 1876 the attorney general of the State filed a petition in the me of the appellant in which it charged that the board of coun-men of the city of Frankfort claimed that it had an unexhausted gislative privilege to raise large sums of money by running and erating a lottery for the benefit of the city school of Frankfort. is further charged that the board of councilmen of the city of ankfort claim that by legislative authority it has the authority sell and transfer the lottery privileges, and that in 1875 it did un-rtake to sell and convey to one Stewart its pretended lottery fran-ses and privileges, and that Stewart has sold to others who are gaged in selling lottery tickets, etc., and that appellee Pepper l others, under the name and style of the "Kentucky *Chas* Dis-ution Company," proposed to have a grand drawing of prizes the 1st of August, 1876.

It is further charged that Pepper and others have adver-
44 tised this drawing extensively and are engaged in the sale of tickets by thousands at twelve dollars for a whole ticket, six dollars for a half ticket, and at the same ratio for a smaller fraction of a ticket, and that they propose a distribution of several hundred thousand dollars to the lucky drawers of prizes. It is further charged that in 1838 the legislature of this State authorized one hundred thousand dollars to be raised by way of lottery, to be expended for the benefit of the city school of Frankfort and for the erection of the proper machinery by which to supply the city with water, to be conveyed from the Cove spring.

It is, however, charged that the amount authorized to be raised by the act of 1838 has long since been received by the proper city authorities, and that the attempted sale by the city and the exercises of lottery privileges by its pretended vendees are without authority of law and injurious to public morals by tempting the people into the immoral practice of gaming.

The appellant made The Councilmen of the City of Frankfort, The City School Trustees, and Stewart and others defendants, and asked the court to enjoin the defendants from proceeding further to sell tickets and operate the lottery privileges claimed by them, and finally the court was asked to cancel, annul, and adjudge void the privileges claimed by the appellees.

The defendant- demurred to the appellant's petition. The
45 court overruled the demurrers except so far as the suits ought to effect the rights of the parties under and by virtue of the act of 1838; but, on refusal of the attorney general to make the board of managers of the lottery privileges granted in 1838 parties, the suit was dismissed so far as it affected defendants' rights under that act.

This is an ordinary action brought to prevent the usurpation of a pretended franchise and is authorized by section 529 of the former Code of Practice, as was decided by this court in the case of The Commonwealth *vs.* The City of Frankfort and others (13 Bush., p. 186).

The Board of Councilmen answered the petition of appellant and asserted its right to operate a lottery by legislative grant for the support of the city schools of Frankfort, and the other defendants claimed as beneficiaries or vendees of the said board of councilmen.

On hearing, the lower court dismissed appellant's petition, and that judgment is here for revision. On the first day of February, 1838, the legislature by its enactment vested in a board of managers the right to raise by way of lottery one hundred thousand dollars in one or more classes, as to them might seem proper. One-half of this sum was to be appropriated "to the use and benefit of a city school in the town of Frankfort, and the other half for the construction of such reservoirs, pipes, and conductors as may be necessary and proper to convey the water from the Cove spring into said town."

The second section provides that the managers shall not reserve more than twenty per cent. of the prizes, and the fourth section authorizes the managers to dispose of the entire lottery scheme or any classes thereof for not less that ten per cent. of the prizes proposed to be drawn.

On the 16th of March, 1869, the legislature passed an act entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort." By this act the legislature, instead of trustees, established a board of councilmen and vested in them the legislative authority of the city, and in the 18th section of said act it is provided that "said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in the act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved February 1st, 1838, and shall invest all money realized thereunder in safe and solvent securities, and may use and appropriate the interest and profits of such investments for the support of the city school." The act referred to by this act of 1869 is the act of 1838, which granted to the managers therein named a lottery franchise or privilege till *it by* one hundred thousand dollars were raised for the benefit of the city school and the water works of Frankfort; and by the act approved March 28th, 1872, the board of councilmen of the city of Frankfort are authorized to sell and transfer all property or franchises belonging to the city, and by these several acts it is claimed that the board of councilmen have a clear legislative grant of the right to raise one hundred thousand dollars by way of lottery, and that neither they nor their vendees can be operating or running a lottery in violation of law till the authorized sum has been raised, which has not been done.

If, therefore, the act of February 1st, 1838, granted to the managers therein named a lottery franchise, it seems to us that the act of March 16th, 1869, also granted one to the board of councilmen of the city of Frankfort, for it says that "said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city school of the town of Frankfort, and for other purposes,' approved February 1st, 1838," and as the franchises, powers, and authority conferred on the managers by the act of February 1st, 1838, embraced the right to raise $100,000 by way of lottery, the franchises, powers, and authority of the board of councilmen of the city of Frankfort will not be the same as that conferred on the managers by the act of 1838 unless they also embrace a lottery privilege or the right to raise $100,000 by way of lottery.

The word same may be synonymous with that of identical, but more generally synonymous with equal or exactly similar. We therefore conclude that the legislature of 1869 conferred on the board of councilmen of the city of Frankfort franchises, powers, and authority equal or exactly similar to those that had, by the act of 1838, been conferred on the managers, which included the privilege of raising $100,000 by operating a lottery. It is very common in the acts incorporating turnpike companies

to confer on them the same franchises, powers, and privileges as had been conferred by the legislature on some other turnpike company, and nobody ever dreamed that by such enactments the legislature either intended or did transfer the franchises of the companies referred to to the companies it was incorporating.

Suppose, for instance, that the legislature had enacted that the Owingsville and Sharpsburg Turnpike Road Company shall have the same powers, privileges, and franchises as are conferred upon the Mt. Sterling and Paris Turnpike Road Company by an act which is specifically identified by its title, etc., can it be contended that by the passage of such an act the franchises, etc., of the Mt. Sterling and Paris Turnpike Company are transferred to the Owingsville and Sharpsburg Turnpike Company? We think not; but such an act would confer upon the Owingsville and Sharpsburg Turnpike Company powers, privileges, and franchises similar to those which had been conferred on the Mt. Sterling and Paris Turnpike Company by the previous act referred to.

It is quite common for the legislature when creating one corporation to confer on it the same powers and privileges that have been conferred on a similar corporate company by a previous act, and yet it has never been contended that this legislation transfers the franchises of the corporation referred to to the one being created. It only confers similar powers, franchises, etc., on the corpo-
49 ration to those that had been conferred on the one that was referred to as then existing.

Besides, the fair presumption at the date of the act of 1869 would have been that the lottery franchises granted to the managers by the act of 1838 had been exhausted, and we cannot assume that the legislature intended to confer on the board of councilmen of the city of Frankfort a franchise which it was reasonable to presume had been exhausted from the age of the grant and other circumstances.

But it is contended that the 18th section of the act of March 16, 1869, in so far as it attempts to confer a lottery privilege, is in contravention of the 37th section of article 2 of the constitution of this State, and therefore void, which section is as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title."

In commenting on similar constitutional provisions of other States Judge Cooley, in his work on Constitutional Limitations, says: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object, which is fairly indicated by its title: to require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. It has accord-
50 ingly been held that the title of "An act to establish a police government for the city of Detroit" was not objectionable for its generality, and that all matters properly connected with the establishment and efficiency of such a government, including taxa-

tion for its support and courts for the examination and trial of offenders, might constitutionally be included in the bill under this title. The generality of the title is therefore no objection to it, so long as it is not made a cover to legislation incongruous to itself, and which by no fair intendment can be considered as having a necessary or proper connection. The legislature must determine for itself how broad and comprehensive shall be the object of a statute and how much particularity shall be employed in the title in defining it."

The act assailed as being unconstitutional is entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," and it is provided in the 18th section that the same franchises, powers, and authority are conferred on the board of city councilmen as are conferred on the managers in an act entitled "An act for the benefit of the city school of the town of Frankfort, and for other purposes," approved February 1, 1838, and shall invest all money realized thereunder in safe and solvent securities and may use and appropriate the interest and profits of such investment for the benefit of the city school.

The question is whether, under the title of an act to amend
51 and reduce into one the several acts in relation to the city of Frankfort, the legislature can provide for raising the means by taxation, lottery, or otherwise for the education of *of* the children of the city.

We are of the opinion that the provisions of the 18th section of the law are covered by its title. Many acts had been passed by the legislature which related to the city of Frankfort, and, amongst others, an act establishing a city school and authorizing a lottery to be operated for its be-efit, and the object of the act of 1869 was to amend and reduce all these laws into one act, and therefore, by the title of this act, the members of the legislature were notified that all acts relating to the city of Frankfort, as well her educational as other laws, were to be amended and reduced into one.

By an act entitled "An act to amend the charter of the Cincinnati and Covington Bridge Company," the legislature increased the capital stock of the company $700,000 and authorized it to sell $100,000 of its stock to the city of Covington, and authorized the city of Covington to raise the $100,000 by a sale of its bonds and tax its people to pay the interest on them, and yet this court has held that it relates to but one subject, which was expressed in the title. This court has repeatedly held that the provision of the constitution should receive a liberal and not technical construction, and that no provision of a statute relating directly or indirectly to the subject expressed in the title having a natural connection therewith and not foreign to the same should be deemed within the constitutional inhibition. But should any doubt still exist as to whether the 18th section of the act of 1869, *supra*, is covered by its title, they should be forever put to rest by the decision of this court in the Louisville lottery cases, in which it was decided that under the title of an act to establish a public library for the city of Louisville the legislature had the power and

did vest in the library corporation lottery privileges that enabled it to sell the grandest schemes and have the largest lottery drawings ever witnessed in our State; and as this lottery privilege was unanimously decided by this court to be germane to the Louisville library title, it will not do to say that a lottery franchise is not germane to the act of 1869, *supra*.

Certainly the education of the youth of Frankfort related not only to the city, but to its future prosperity and welfare, and we are of opinion that the provisions of the 18th section of the act of 1869 were fully covered by its title when construed in the light of the decisions of this and other courts of the Union; and as the evidence does not indicate that the lottery franchise has been exhausted, we are of opinion that the court on hearing properly dismissed the appellant's petition.

If the lottery privilege is immoral in its tendency the legislature must interfere. This court can construe and decide what
53 the law is, but has no power either to make a law or repeal one already made by judicial construction.

Wherefore the judgment of the court below is affirmed.

Kentucky Court of Appeals.

FEBRUARY 27, 1878.

COMMONWEALTH, Appellant, *vs.* CITY OF FRANKFORT, &c., Appellees. } Appeal from a Judgment of the Oldham Circuit Court.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is therefore considered that said said judgment be affirmed.

Which is ordered to be certified to said court.

A copy.

(Attest:)

T. C. JONES, *C. C. A.*,
By VIRGIL HEWITT, *D. C.*

At a court held on the 5th of April, 1892, the following order was entered herein:

Came parties, by counsel, and by consent ordered by the court that this case be passed to 9th inst.

Also, on the 5th day of April, 1892, the following order was entered in action No. 33728½, Commonwealth of Kentucky *vs.*
54 Henry Academy and Female College, &c., which also refers to this action, as follows:

Ord. Fil. Gen'l Dem'r & Dem'r to 1st, 2nd, & 3rd Paras. Answer.

Plaintiff, by counsel, filed a general demurrer and a demurrer to the 1st, 2nd, and 3rd paragraphs of the answer herein, and by consent of parties said demurrers are to apply and be heard in the case of The Com'th of Ky. *vs.* The Frankfort Lottery Co., J. J. Douglas, &c., No. 35719½, as to the answer filed herein.

By consent of parties, ordered by the court that said demurrer- be set to the 9th inst. for hearing.

Which demurrers to the answer filed herein are as follows:

D'm'r Ans.

Louisville Law & Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
FRANKFORT LOTTERY COMPANY, &c., Defendants. } Demurrer.

Now comes the plaintiff, The Commonwealth of Kentucky, and demurs to the answer of J. J. Douglas, filed herein, because said answer does not state facts sufficient to have or maintain a defense to the plaintiff's petition.

Wherefore plaintiff prays judgment accordingly.

WM. J. HENDRICK,
Attorney General.

Dem'r 1st, 2nd, & 3rd Paras. Ans.

Louisville Law & Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
55 FRANKFORT LOTTERY COMPANY, &c., Defendants. } Demurrer.

Plaintiff demurs to the first paragraph of the answer of J. J. Douglas, because said paragraph does not state facts sufficient to have or maintain defense to the plaintiff's petition.

Second. The plaintiff demurs to the second paragraph of defendant's answer, because said second paragraph does not state facts sufficient to have, maintain, or constitute a defense to plaintiff's petition.

Wherefore plaintiff prays judgment accordingly.

Plaintiff demurs to third paragraph of answer, because said third paragraph does not state facts sufficient to maintain or constitute a defense to plaintiff's petition.

Wherefore plaintiff prays judgment accordingly.

WM. J. HENDRICK,
Attorney General.

At a court held on 9th of April, 1892:

Came parties, by counsel, and the argument on the general and special demurrers to the answer herein having been heard in part, and there not being time to conclude on today, ordered by the court said argument be continued to Monday morning next at 10 o'clock.

Ord. Sub. Dem'rs Ans.

At a court held on 12th of April, 1892:

Came parties, by counsel, and the demurrers to the answer
56 being heard *was* submitted, and the court, not being advised, takes time.

Ord. Fil. Opinion; Ord. Ovrlg Dem'rs Ans; Ord. Dis. Pet. & Judg't; Ord. App'l.

At a court held on 12th of May, 1892:

Came parties, by counsel, and the court filed an opinion herein.

And this cause being heard on the plaintiff's demurrers to the answer of J. J. Douglas, filed herein, and the court being sufficiently advised, it is adjudged that the demurrers to the answer of defendant J. J. Douglas be, and they are hereby, overruled; to which ruling of the court *that* plaintiff excepts; and, the plaintiff declin*gin* to plead further, it is adjudged that plaintiff's petition be dismissed; to which ruling of the court plaintiff excepts and prays an appeal to the court of appeals, which is granted.

Which opinion, filed herein, is as follows:

57

Opinion.

In the Louisville Law and Equity Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE HENRY ACADEMY AND FEMALE COLLEGE LOTTERY, J. J. DOUGLAS, OWEN STEWART, and C. F. TATUM, Defendants.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE FRANKFORT LOTTERY COMPANY, J. J. DOUGLAS, OWEN STEWART, and C. F. TATUM, Defendants.

These two actions are heard together. Each one is a proceeding in the nature of a *quo warranto* instituted by the attorney general on behalf of the Commonwealth against the defendants under sections 480, 481, 483, 485, and 487 of the Civil Code, to prevent the usurpation of a franchise and to compel the defendants to show by what warrant or authority they or any of them claim to exercise the lottery franchises under which they are operating said lottery grants.

The defendant J. J. Douglas has filed his separate answer to each of said petitions; to which said answers the Commonwealth has demurred. This submission of said two actions is upon the said demurrers of the Commonwealth to said answers of the defendant J. J. Douglas.

1. The old writ of *quo warranto* originally was at common law a

civil writ at the suit of the Crown, as *custos morum* of the
58 nation, and was not a criminal prosecution, although it was originally returnable only in the court of King's Bench. 5 Bac. Abr. Information (A). Whether, however, it was originally a civil or criminal proceeding has been much controverted. In the case of Rex *vs.* Bennett, mayor of Shaftsbury, Tr. 4, G. 1, the twelve judges were equally divided upon this question, and, what was quite remarkable, two upon each bench were of different opinions, Parker, Bury, Powys, Blencour, Dormer, and Fortesque holding that it was criminal, while King, Tracey, Price, Ayer, Pratt, and Montague that it was a civil suit. At any rate, whether civil or criminal, it was directed against the person or persons who claimed or usurped any office, franchise, liberty, or privilege belonging to the Crown to inquire by what authority they maintained their claim. The judgment upon this writ was that the franchise, liberty of privilege, *capiatur* in *manum domini regis*. On account of the delay and technical difficulties attendant upon the prosecution of the writ of *quo warranto* it fell into disuse in England and gave way to a more expeditious statutory mode of proceeding under various acts of Parliament, the 4th and 5th of William and Mary and 9th Ann, to wit, to an information filed by the King's attorney general in the nature of a *quo warranto*, in which the person or persons usurping were considered as offenders punishable by fine. 2 Wheaton's Selwyn, 322–324. The process upon an information in the nature of a *quo warranto* was either a *venire facias* and *distringas* or a subpœna
59 and attachment. It was irregular to proceed against the defendants by rule to appear.

People *vs.* Richardson, 4 Cowan and the note.

The common-law writ of *quo warranto* and the English statutory proceeding by information in nature of a *quo warranto* has been much simplified in Kentucky under sections 480, 481, 483, 485, and 487 of the Civil Code of Procedure, which provides as follows: "Section 480. That in lieu of the writs of *scire facias* and *quo warranto* or of an information in the nature of a *quo warranto*, ordinary actions may be brought to vacate or repeal charters and to prevent the usurpation of an office or franchise." Section 483. "If a person usurp an office or franchise the person entitled thereto or the Commonwealth may prevent the usurpation by an ordinary action." And section 485. "For usurpation of other than county offices or franchises the action by the Commonwealth shall be instituted and prosecuted by the attorney general." And section 481. "The action to repeal or vacate a charter shall be in the name of the Commonwealth and be brought and prosecuted by the attorney general, or, under his sanction and direction, by an attorney for the Commonwealth," and section 487 provides, as to the judgment in such actions, that "a person adjudged to have usurped an office or franchise shall be deprived thereof by the judgment of the court. * * * And the court shall have power to enforce its judgment by causing the books and papers and all other things pertaining to the office or

franchise to be surrendered by the usurper, and by preventing him from further exercising or using the same, and may enforce its orders by fine and imprisonment until obeyed."

The petitions in the two cases at bar are almost identical and are filed under the sections of the civil code above quoted and are founded upon section 226 of the present constitution of Kentucky, which provides that "lotteries and gift enterprises are prohibited, and no privileges shall be granted for such purpose, and no scheme for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked;" and also upon the act of the legislature approved March 22, 1890, entitled "An act to repeal so much of section 18 of the act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,'" approved March 16, 1869, as granted to the board of councilmen of the city of Frankfort the same power and authority as granted to the managers in an act entitled "An act for the benefit of the city schools of the town of Frankfort, and for other purposes," approved February 1, 1838, and to repeal the amendatory acts in relation to the said grants, approved March 28, 1872. Upon these provisions of the present constitution and the said acts of the General Assembly, above referred to, the Commonwealth states that the defendants are exercising the privileges and franchises as originally granted without lawful warrant; that they are usurping the right, privilege, and franchise to operate lotteries under said original
61 grants in contempt of the Commonwealth and against her peace and dignity, and the Commonwealth prays for a judgment of ouster preventing the usurpation of said franchises by the defendants, and that the defendants be excluded from exercising any and all the privileges or franchises as originally conferred by the act of the legislature, and for costs, and for all general and proper relief.

In his answer to the proceeding against the Henry Academy and Female College lottery, the defendant J. J. Douglas denies that on the 22nd of March, 1890, by the act of the legislature referred to in the petition, the privileges conferred by the act of 1850 were repealed, and denies that such was the effect of the constitutional provision referred to in plaintiff's petition, and he sets up the following facts as a special plea in bar to the petition: That by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act for the benefit of the Henry Academy and Henry Female College," approved December 9, 1850, it was provided that certain persons therein named as managers were granted the right by way of lottery to raise in one or more classes, as to them might seem most expedient, any sum not to exceed $50,000.00, to be appropriated to the use and benefit equally of the Henry Academy and Henry Female College, located at Newcastle, in the county of Henry, in the State of Kentucky; that by section 3 of said act it is provided that "said managers shall be, and are hereby, authorized to sell and dispose of said schemes or any class thereof to any

person or persons who shall enter into bond with good
62 security, conditioned well and faithfully to comply with all the terms and conditions of this act, payable to the Commonwealth of Kentucky, which bond or bonds shall be received by said managers and be by them filed in the said Henry county court before said lottery or any class thereof shall be drawn;" that by virtue of said act the managers named therein did sell and convey by contract, in writing, to one Walter Gregory, on the 19th day of December, 1850, the right to operate under said scheme by drawing the classes named therein, and that the said managers of the lottery did by the said contract sell, dispose, assign, and set over to said Walter Gregory the sole right to draw the scheme or schemes of the lottery franchise conferred by said act as he should from time to time deem proper; that in consideration thereof the said Gregory agreed to pay certain sums of money to said managers and to execute bond as required by said act, which said sum was paid and said bond was duly executed, received by said managers, and approved by the county court of Henry county.

The defendant Douglas states that he has acquired the right to operate and conduct the said lottery scheme by drawing said classes and to the net earnings thereof under and by virtue of a contract made upon a valuable consideration with said Gregory and his assignees on the 3rd of September, 1874; that the said contract, among other things, provides and stipulates as follows: And the further
sum of $1,000 on the day when the last remaining one of the
63 classes before mentioned shall be drawn, making in all, inclusive of said last-mentioned sum, an aggregate sum of $26,500; that under said scheme comprising said classes the number 12112 has not been drawn, as provided and stipulated in said contract; that said contract was assigned to Simmons & Co. and thereafter duly assigned to this defendant, Douglas, for a valuable consideration, and that he has expended large sums of money and incurred liability for large sums of money in carrying out said contract; that afterwards, on the 11th day of September, 1878, in the case of J. N. Webb, appellant, *vs.* The Commonwealth of Kentucky, appellee, the court of appeals of Kentucky decided in an action brought by the Commonwealth of Kentucky, by her attorney general, filed originally in the Franklin circuit court, in the nature of a writ of *quo warranto*, *vs.* S. T. Dickinson and others, as vendees of the said managers, to enjoin them from using said grant, that under the act of 1850 the right to operate said lottery was legally granted; that the sale to Gregory and Gregory's assignees was valid, and that section 6 of article 21, chapter 28, of the Revised Statutes, by which it was provided that three years after the adoption of the said chapter all rights and privileges which may have been granted by the legislature of Kentucky to raise money by lottery for any purpose shall cease and determine, was void and of no effect as to the said Gregory, his assignees and vendees; that the said Gregory acquired by said contract a vested right which could not be repealed by subsequent legislatures; that afterwards the said

J. J. Douglas, as assignee and vendee under said contract,
64 in pursuance of the act of the General Assembly of the Commonwealth of Kentucky of December 9, 1850, operating a lottery under a scheme devised by the managers in said act, and by them sold, transferred, and conveyed as aforesaid, was indicted in the Jefferson circuit court for operating a lottery in violation of the laws of the State of Kentucky; that upon the trial of said indictment the said J. J. Douglas was acquitted upon the ground that he had the legal right to operate, manage, and conduct the said lottery notwithstanding the statute of 1850, section 6, article 21, chapter 28, of the Revised Statutes, which provided as aforesaid that three years after the adoption of the said Revised Statutes all rights and privileges which may have been granted by the legislature to raise money by lottery for any purpose should cease and determine, and this judgment of the Jefferson circuit court dismissing said indictment against the said Douglas was, upon an appeal duly taken therefrom to the court of appeals of Kentucky on the 25th day of November, 1882, affirmed, the said appellate court adjudging as follows:

"The opinion of this court in the case of J. N. Webb, &c., *vs.* The Commonwealth, delivered September 11, 1878, is conclusive of the principal questions raised in this case. That case was between the same parties in interest here, was decided upon its merits on facts admitted in the pleadings, and establishes the following propositions of law applicable to lottery grants approved December 9, 1850, authorizing the raising of $50,000 for the benefit of the
65 Henry Academy and Henry Female College:

"First. That the grant was not repealed by the Revised Statutes which went into effect July 1, 1852.

"Second. That the transfer to Gregory by the trustees and by Gregory to Simmons and Dickinson vested in the latter the right to raise by lottery the sum of $50,000.

"Third. That there has been no use made of the franchise up to the 14th day of February, 1877, the time at which the pleadings were completed in the Webb case, and therefore no question of exhaustion prior to that time could arise. The instructions of the court below and the rulings of the court in the admission and rejection of evidence were in conformity to the three propositions stated, and therefore no error was committed to the prejudice of the Commonwealth. Judgment affirmed."

The defendant Douglas in this action pleads and relies upon the said judgment of the Jefferson circuit court and of the court of appeals as *res adjudicata* in bar of this proceeding, and claims that by virtue of the said decisions by the Jefferson circuit court and the court of appeals in said case his right to operate the said Henry Academy and Female College lottery is legal, existing, and unimpeachable, and that the said act of the legislature referred to in the petition approved March 22, 1890, and section 226 of the present constitution are void in so far as they affect his right to operate said Henry Academy and Female College lottery.

To this answer of Douglas the Commonwealth has de-
66 murred. It will be seen that the defendant in the case of the Henry Academy and Female College lottery presents two defenses: First, the plea of *res adjudicata* by virtue of the judgments of the Jefferson circuit court and of the court of appeals in the indictment and judgments pleaded in bar, and, second, the unconstitutionality of the act of 1890 and of section 226 of the present constitution in so far as they attempt to divest or interfere with his right to operate the said Gregory franchise. So far as the plea of *res adjudicata* is concerned, I agree with the learned attorney general that while a judgment of ouster is a complete bar until reversed or vacated a judgment for a defendant in a *quo warranto* proceeding is not a bar to a subsequent *quo warranto* proceeding against him for usurpation of the same franchise for other or supervenient grounds. In such a proceeding a judgment for the defendant may be proper in a former action for many reasons which may not exist in a subsequent proceeding against the same defendant upon the same franchise. The grant itself may not have terminated or expired in the first proceeding and the defendant in that proceeding may not have been guilty of any acts which in a subsequent proceeding could be successfully charged against him as a ground of forfeiture of the franchise or vacation of the charter.

The analogy between a *quo warranto* and an action in ejectment as contended for by the learned attorney general, I think, is complete.

See—

67 Speed *vs.* Braxtell, 7 Mon., 575.
McClain *vs.* French, 3 Mon., 386.
Eastin *vs.* Rucker, 1 J. J. Marshall, 234.
People *vs.* Scott, 19 Johnson N. Y.
Utica Insurance Company *vs.* Scott, 8 Cowan.
People *vs.* Richardson, 4 Cowan.

While the opinion of the court of appeals pleaded and relied on by the defendant may be useful as illustrative of the character and validity of the rights of parties under a contract, it is wholly unavailing as a plea of *res adjudicata* to a subsequent *quo warranto* proceeding against the same defendant.

See Troutman *vs.* Vernon, 1 Bush., 482.

It follows, therefore, that with reference to this Henry county grant the plea of *res adjudicata* is not well taken and the demurrer thereto must be sustained.

The defendant further pleads in bar of the proceedings to vacate the Henry county grant the contract entered into with Walter Gregory on September 3, 1874, in which, as successors to the Henry county grant, it appears that he was bound on the 19th day of June, 1889, as Gregory had been, to pay in lawful money of the United States, among other payments, the following: On the 19th of June, 1889, and on the 19th day of December, 1889, and on the 19th day of June, 1890, and on the 19th day of December, 1890, and on the

19th day of June, 1891, respectively, the sum of $750, and the further sum of $1,000 on the day when the last remaining
68 one of the classes shall be drawn, making in all, inclusive of said last-mentioned sum, an aggregate of $26,500.

By reference to the "Exhibit A," referred to in the defendant's answer, and which is made part thereof, the date of the last drawing and of the last class to be drawn under said scheme was on the 19th day of June, 1891, on which last day the sum of $750.00 was to be paid, and also the further sum of $1,000.00, making in all, inclusive of said last-mentioned sum, the aggregate of $26,500.00. The defendant alleges that he has the right to continue to operate said lottery privilege or franchise, because he says all of said classes up to and including the last class, No. 12112, and which, when drawn together with the $1,000.00 required by said contract, would make the aggregate sum of $26,500.00, have not been drawn, and that he has the right to operate the said lottery until the said last class of 12112, with the payments due thereon, which would make the sum of $26,500.00 under the said Gregory contract, shall have been drawn and realized; but by reference to the Walter Gregory and Simmons contract contained in "Exhibit A" and referred to in his said answer, under which the defendant operates the said lottery franchise, it will be seen that this right to operate said franchise terminated and expired on the 19th day of June, 1891, when the last payment of $750.00 and the $1,000.00 in addition should have been paid. He cannot extend the limitation upon the operation of the said franchise beyond the boundary fixed to it under the Simmons and Gregory contract, through and under which he
69 claims the right to operate the same, because of his not having drawn the full complement of classes and his consequent failure to realize and pay over the full amount of $50,000.00 as required by the said Gregory contract, and so it follows that his right to operate the same has terminated and no longer exists by reason of the expiration of the limitation under the Gregory and Simmons contract for operating the same.

For this reason the demurrer to the answer of J. J. Douglas in the case of the Henry Academy and Female College lottery grant must be sustained; and, as it is impossible for him to amend by reason of the expiration of the grant or franchise, a judgment of ouster must be awarded the Commonwealth in accordance with the prayer of its petition, enjoining and prohibiting him from further operating said grant or franchise, and that the same be adjudged to have terminated and expired and no longer to exist, and also for a judgment for costs in this action.

We come now to consider the demurrer of the Commonwealth to the answer of J. J. Douglas in the action against him for operating what is known as the Frankfort lottery grant. The Commonwealth, in this suit, as in the Henry Academy grant, predicates its demand for judgment against him herein upon section 226 of the present constitution above quoted, and also upon the act of the 22nd of March, 1890, entitled An act to repeal so much of section 18 of the act entitled An act to amend and reduce into one the several

70 acts in relation to the city of Frankfort, approved March 16, 1869, as granted to the board of councilmen of the city of Frankfort the same power and authority as had been granted to the managers in an act entitled "An act for the benefit of the city schools of the town of Frankfort," and for other purposes, approved February 1, 1838, and to repeal the amendatory acts in relation to said grants.

The defendant in his answer in this action presents three pleas or defenses to the petition of the Commonwealth. In his first he formally denies that he is unlawfully exercising the franchise or privilege in controversy; secondly, he pleads the various acts of the legislature, commencing with the act approved February 1, 1838, creating the Frankfort lottery "for the benefit of the city schools of the town of Frankfort, and for the construction of such reservoirs, pipes, and other works as might be necessary to convey water from Cove spring to the town of Frankfort," down to and including the act approved March 16, 1869, entitled An act to amend and reduce into one the several acts in relation to the city of Frankfort, which conferred upon the board of councilmen of the city of Frankfort all the powers and privileges, franchise, and authority to operate a lottery which had been conferred on the managers in the original act of February 1, 1838, and also the act of March 28, 1872, authorizing and empowering the board of councilmen of the said city of Frankfort to bargain, sell, and convey, rent, or lease the said lottery franchise conferred upon the said city by the act of March 16, 1869, and also the contract entered into by and between E. S.

71 Stewart and the mayor and board of councilmen of the city of Frankfort on the 31st day of December, 1875, wherein the said city of Frankfort and the mayor and board of councilmen, under and by virtue of the authority conferred upon them by the act of March 28, 1872, for a valuable consideration sold, conveyed, and assigned to said E. S. Stewart the said lottery franchise conferred upon the said city by the act of March 16, 1869. He alleges the death of E. S. Stewart, and that Annie B. Stewart, wife of the said E. S. Stewart, was the sole legatee and devisee under the will of the said E. S. Stewart, which was duly probated, and that under said will the said Annie B. Stewart was the sole owner of said franchise scheme and contract purchased by E. S. Stewart, her husband, from the city of Frankfort, as aforesaid, under his said contract of December 31, 1875, and that he, the said J. J. Douglas, the defendant in this action, by a contract in writing entered into with the said Annie B. Stewart, for a valuable consideration, acquired and has the right to operate the said franchise in accordance with the terms of said contract. He avers that all of these said acts of the legislature and the contract of purchase from the city of Frankfort by E. S. Stewart and his, the said Douglas', contract with Annie B. Stewart, sole legatee of E. S. Stewart, were passed, entered into, and performed prior to the passage of the act of the General Assembly of the 22nd of March, 1890, relied on by the Commonwealth, and prior to the adoption of the constitutional provision (section 226) cited, referred to, and relied

72 on in the petition of the Commonwealth, and he says that

by virtue of the said prior acts of the legislature and of said contracts he became invested with the right to conduct, manage, and operate the said franchise and to own and have the net earnings resulting from the operation thereof prior to the passage of the said acts of the General Assembly and prior to the adoption of the said constitutional provision, section 226 of the present constitution, relied on by the Commonwealth in this proceeding; that, having and owning a property right under said contracts to operate the said privilege or lottery grant, it is incompetent for the State of Kentucky to impair or destroy the obligations of his said contract and his property rights growing out of the same either by her legislature or by her constitutional convention.

In his third paragraph he pleads and relies upon the decision of the court of appeals of Kentucky, rendered on the 27th day of February, 1878, affirming the judgment of the Oldham circuit court in the case of The Commonwealth of Kentucky *vs.* The City of Frankfort as *res adjudicata* and a plea in bar of this proceeding.

As we have seen in a former part of this opinion, when considering the defendant's claim under the Henry Academy and Female College grant, the plea of *res adjudicata* in a proceeding against a party charged with the usurpation of a franchise is not a bar to a subsequent *quo warranto* proceeding under the code against him, however useful and authoritative such decisions may be in determining the validity of the original grant and of the contract
73 rights therein subsequently acquired by intervening third parties, purchasers for value. It is ingenuously and ably argued by both of the learned and distinguished counsel for the Commonwealth that the answer is insufficient in this action because it had not sufficiently averred a compliance on the part of the defendant and of those under whom he claims with the covenants devolved upon them by virtue of the contract of the 31st of December, 1875, between E. S. Stewart and the city of Frankfort; that, outside and independent of the constitutional question raised by the defendant, his answer was bad for want of sufficient averments of fact showing that at the time of the filing of the *quo warranto* proceedings against him he was entitled to operate the said franchise, the learned counsel insisting that the defendant in this action must evince by specific averment his title to the disputed franchise, just as in an action of ejectment the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his a-versary.

By an examination of the answer it will appear that the defendant, although upon rules of pleading applicable to actions such as this, is not required to do so, yet has averred with particularity on his part and on the part of those through whome he claims a compliance with all the covenants and obligations imposed upon them by the said contract of purchase between E. S. Stewart and the city of Frankfort of December 31st, 1875. Upon this point it is sufficient to say, the constitutional question being laid aside for the present, that if the validity of the acts of the legislature creating and conferring the said lottery grant in the first

stance and the validity of the contract of purchase by E. S. ewart of said franchise or grant from the city of Frankfort be nceded, the Commonwealth in this action, under the sections of e code above cited, must, as in any other civil action, in order to mand judgment against the defendant in the *prima facie* rightful ssession of such grant or franchise, allege and prove facts incon- tent with such *prima facie* show of title on his part. This pro- eding is not in the nature of a bill of discovery against the de- ndants and cannot be used for such purposes. The defendant uglas has specially pleaded the various acts of the legislature eating the said franchise and conferring it upon the city of Frank- t, and the act of March 28th, 1872, authorizing the city of Frank- t to sell and convey it, and of the purchase by E. S. Stewart of d franchise from the city of Frankfort, and of his, the defendant's, uisition of title by contract to whatever rights or privileges the d E. S. Stewart derived under said contract with the city of nkfort; all of which he avers occurred prior to the adoption of present constitution of Kentucky and of the acts of the General sembly upon which these proceedings are founded.

The Commonwealth by its demurrer acknowledges the truth of ry statement of fact averred in the answer, and thus raises the stion whether the rights of the defendant are protected under either the State constitution or the Constitution of the United States, or both. Section 20 of article 13 (bill of rights) of the State constitution of 1850 provides "that no *ex post facto* nor any law impairing contracts shall be made." Section 19 of bill of rights of the present constitution, setting forth the great essential principals of liberty and free government, provides at no *ex post facto* law nor any law impairing the obligation of tracts shall be enacted." By article 1, section 10, clause 1, of Constitution of the United States, it is provided "that no State ll * * * pass any bill of attainder, *ex post facto* law, or any impairing the obligations of contracts." * * *

o avoid confusion of thought it is well to understand as we go ng what propositions of law are and what propositions of law are disputed, as well as to understand the character of the question ch this court is called upon to decide in this case. With the imental and ethical aspect of this case the court has nothing to I decline to discuss or pass upon it. This phase of the case perly belongs to the jurisdiction of moralists, orators, rhetori- s, the stump, the pulpit, and the press, whose province is to ulate and enforce public sentiment. The duty of the judiciary ot to make the law, but to expound it, and when, through the ious and mighty agency of these potent formulators of public iment, a storm of public prejudice is raised against any sys- or policy which may have once received public favor and tion, the legal rights of the citizen when threatened with destruction like the divine will revealed to the prophet Elijah on the mountain side is not to be discovered in the raging tempest, the earthquake, or the fire of public ut only in the still, small voice of the constitution, addressed to

the conscience of an impartial and independent judiciary. I approach the consideration of the constitutional question presented in this record with the most cautious circumspection and not without a full sense of the responsibility which its decision imposes. I shall consider the acts of the legislature and the contracts pleaded by the defendant as creating a constitutional bar to this action. The act of February 1st, 1838, entitled "An act for the benefit of the city schools of the town of Frankfort," and for other purposes, granted to certain persons named in said act the right to raise by way of lottery in one or more classes, as to them might seem expedient, a sum not to exceed a hundred thousand dollars, to be appropriated, one-half for the use and benefit of the city schools in the town of Frankfort and the other half for the construction of such reservoirs, pipes, and other works that might be necessary to convey water from Cove spring to the town of Frankfort. By section 4 of said act it was provided that the managers of said lottery created by said act "shall be, and they are hereby, authorized to sell and dispose of the scheme of any class or classes of said lottery to any person or persons who shall enter into bond to the Commonwealth of Kentucky, with
77 good security, with condition well and faithfully to comply with all the terms and provisions of this act, which bond or bonds shall be received by the said managers and be by them filed in the clerk's office of the Franklin county court before said lottery or any class thereof shall be drawn." In the year following, by an act approved February 16th, 1839, entitled "An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes," it was provided by section 26 thereof as follows: "The fourth section of an act entitled An act for the benefit of the city schools for the town of Frankfort, and for other purposes, approved February 1st, 1838, is hereby repealed, and it is hereby further enacted that the managers referred to in said act, or their successors, shall be, and are hereby, authorized to sell and dispose of the scheme of any class or classes of the lottery referred to in the said act to any person or persons who shall enter into bond, with good security, to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said act thus amended, which bond shall be received by said managers and be by them filed in the clerk's office of the Franklin county court before said lottery or any class thereof shall be drawn, and if said bond and security is approved and declared to be sufficient by said county court and also by the board of trustees of the town of Frankfort, then in such case the managers shall not be individually responsible for any prize or prizes that may be drawn." By an act approved May 21st, 1861, entitled "An
78 act in relation to the town of Frankfort," it was provided as follows: "That so much of the 26th clause of an act entitled 'An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes,' approved February 16th, 1839, as has been repealed by a subsequent act or acts of the General Assembly of this Commonwealth shall be, and the same is hereby, re-enacted, and all subsequent acts repealing the same are

hereby repealed." By an act approved March 16th, 1869, entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," it was provided that "the city of Frankfort and its affairs shall be conducted by a board of councilmen, to be selected and qualified under the provisions of said act," and by section 18 of said act it was provided "that the said board of councilmen shall exercise and possess all the powers and privileges which by the general laws of the land in relation to towns and cities are granted to said trustees and councilmen. Said board of councilmen shall have the same franchises, powers, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city schools of Frankfort and for other purposes,' approved February 1st, 1838, and shall invest all the money realized thereunder in safe and solvent securities, and may use and appropriate the interest and profits of such investments for the support of the said schools."

By an act approved March 28th, 1872, entitled "An act amendatory to the laws of the city of Frankfort," it was provided as follows:

"That the board of councilmen of the city of Frankfort be,
79 and they are hereby, authorized and empowered to grant, bargain, sell, and convey, to rent and lease, any and all property or any part thereof belonging to the city of Frankfort, be the same lands, tenements, goods, chattels, or merchandise or immunities, on such terms and for such sums and at such times as said board of councilmen shall deem for the best interests of the city of Frankfort."

These are the acts of the legislature referred to and relied on by the defendant in his answer.

Looking to the preamble of the act of February 1st, 1838, which first created the franchise or immunity privilege of operating a lottery and conferred the right upon the municipality of the city of Frankfort to operate it, for the purpose of raising the sum of $100,000.00, it will be seen that the bestowal upon the said city of Frankfort in the first instance of the lottery franchise was by no means a mere voluntary gratuity or license upon the part of the State, but was a grant sustained by a highly meritorious and valuable consideration. The State of Kentucky had diverted, appropriated, and used the entire school fund of the city of Frankfort, and for the purpose of reimbursing the city of Frankfort for the said school fund thus appropriated by it the Commonwealth created and bestowed upon the said city of Frankfort the right to operate a lottery franchise for the purpose of raising $100,000.00. It is perfectly legitimate to look to the recitals in the preamble of an act to ascertain its intrinsic character and purpose. Indeed, Lord Coke is authority for the statement that "the preamble is the key with

which to unlock the meaning of the statute."

80 These were the statutes of the State with reference to the Frankfort lottery grant when the parties, the City of Frankfort and E. S. Stewart, came to make their contract on December 31st, 1875. The act of March 16, 1869, had conferred upon the board of councilmen of the city of Frankfort all the powers and

privileges, franchises, and authority to operate a lottery which had been conferred on the managers in the original act of February 1st, 1838, and the act of March 28th, 1872, had expressly authorized and empowered the said board of councilmen to bargain, sell, and convey the said lottery franchise which had been conferred upon the said city by the act of March 16, 1869. All contracts are to be expounded and their construction, interpretation, and validity tested and determined by the law of the place where and when they are made. Matters connected with their performance are regulated by the law of the place of performance and *lex loci contractus*, while the remedial matters depend on the law of the place where the remedy is invoked, the *lex fori*. Scudder *vs.* The Union National Bank, 1 Otto, 413. The Frankfort lottery privilege was created and conferred upon the city of Frankfort by the law-making power of the Commonwealth; its legislative promulgation was authorized and sanctioned by the organic fundamental law of the Commonwealth then in force. The lottery franchise or privilege at the time E. S. Stewart purchased it from the city of Frankfort, on the 31st day of December, 1875, was lawful, because
81 it had been created by an express statute and conferred upon the city. Its end, object, and purpose, as we have seen, were lawful. The legislature, to accomplish the purposes and design of its original creation, authorized the city of Frankfort to sell the said franchise to any purchaser who would pay for it. Relying upon the legal validity of said privilege which had been conferred by the State government upon the city of Frankfort, and relying further upon the authority expressly conferred by the law-making power of the State upon the city of Frankfort to sell and dispose of the same, E. S. Stewart entered into a contract or purchase of said privilege for a valuable, legal consideration. Surely there was nothing immoral in this transaction, unless crime be imputed to the State. The binding obligation of this contract of purchase by Stewart from the city of Frankfort is derived from a source above the vendor. It rests upon the power conferred by the State sovereignty upon the city of Frankfort to make it, the same power that created the franchise and conferred it upon the city of Frankfort in the first instance. While all must concede and none will dispute the legal proposition that a legislative grant in Kentucky is always revocable in the hands of the grantee under the act of 1856, and that as to a mere license or lottery privilege the grantee holds it only *durante bene placito*, and, further, while it is admitted that the lottery privilege is strictly within the police power of a State, and as such is subject to the ultimate legislative will of the Commonwealth to continue or destroy it, the question presented here by the demurrer of the Commonwealth is beyond and outside of
82 these postulates of law. While the lottery privilege under the act of February 1, 1838, bestowing it in the first instance upon the city of Frankfort, and under the act of March 16, 1869, bestowing the original franchise upon the board of councilmen of said city, was in the hands of the first donees or grantees of said privilege revocable, and could only be revoked by the State and

could only be exercised by the said grantee, the city of Frankfort, *durante bene placito*, the defendant insists that when the Commonwealth, through its law-making power, by an act approved March 28, 1872, authorized the board of councilmen of the city of Frankfort to sell the said franchise, and when E. S. Stewart, acting upon the faith of said act, purchased the said privilege from the city of Frankfort, the Commonwealth, thereby having placed the subject-matter within the domain and under the control of the contract obligations between the said city of Frankfort and the purchaser, constitutionally disabled herself from subsequently impairing said contract by subsequent hostile legislation against the subject-matter thereof. This is the contention of the defendant in this action. What was the character of the property acquired by E. S. Stewart under the contract of purchase which he entered into with the city of Frankfort on December 31, 1875? The court of appeals of Kentucky has answered this question. In Gregory's Executrix *vs.* The Trustees of Shelby College, 2 Metcalfe, 589, the facts are these: A lottery franchise has been conferred by the legislature of Kentucky in February, 1836, upon the trustees of Shelby College. At the
83 next ensuing session of the legislature an act was passed which, by section 3 thereof, empowered the managers to sell and dispose of the scheme or any class or classes of said lottery to any person or persons who should enter into bond with good security, conditioned well and faithfully to comply with all the terms and conditions of the said act, payable to the Commonwealth of Kentucky, and with other provisos and limitations upon the power of sale thus conferred. Afterwards John Lane, one of the managers, and others having died or resigned, undertook to sell the lottery franchise to one Walter Gregory. After the death of all the persons who were named as managers, one William I. Waller, a clergyman, who was interested in the advancement of the college, had on the faith of the lottery grant advanced large sums of money which had been appropriated to the benefit of the said Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. After Waller had loaned his money and taken a mortgage upon the lottery grant, an act was passed by the legislature on July 1, 1852, to take effect three years from that date, to wit, on July 1, 1855, which said act is found in the Revised Statutes, page 271, repealing the Shelby county lottery grant and all other lottery privileges theretofore granted for the purpose of raising money by lottery or for any other purpose. The court of appeals, in determining whether or not under his contract of indemnity Waller had the right
84 to continue to have the lottery operated for his benefit after the statute repealing it had been enacted, said: "The grant of a privilege to raise money by a lottery is a mere gratuity; it is not an act of incorporation; it confers no chartered right, nor does it amount to a contract. The power of the legislature to repeal the grant and thereby to withdraw the privilege where no rights have been acquired under the act by which it was created nor any liability incurred in consequence of its passage is therefore clear and

unquestionable. It was said by this court in the case of the Covington and Lexington Railroad Company *vs.* Kenton County Court, 12 Ben. Monroe, 147, that it cannot be denied a legislature possesses the power and the right to take away by statute what has been given by statute unless rights have vested under the law before its repeal. If the legislature delegate an authority, it can certainly be revoked before the power has been exercised in such a manner as to create a vested right. A repeal of a statute necessarily terminates all proceedings under that statute unless rights have accrued under it which cannot be legally divested. It was therefore held in that case that the legislature had the power to repeal an act amending the charter of the railroad company by which a mere privilege only was conferred, and that the repealing act having been passed before any rights had been acquired under the amendment, it was not unconstitutional. Although, therefore, the legislature has the power to repeal the grant of a lottery privilege where no rights have
85 accrued under it, and though lotteries have a demoralizing tendency and *the* exercise a very pernicious influence over the ignorant and credulous part of the community, and for this reason have been almost universally denounced by the law-making power of the different States of the Union, yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then to the extent of such rights, at least, that law must be regarded as unconstitutional and inoperative. This conclusion is, we think, fully sanctioned by the following adjudged cases:

"Dartmouth College *vs.* Woodward, 4 Wheaton, 518–643.

"Fletcher *vs.* Peck, 9 Cranch, 88.

"University of Maryland *vs.* Williams, 9 Gil. & Johnson, 365.

"Terret *vs.* Taylor, 9 Cranch, 52.

"City of Louisville *vs.* University of Louisville, 15 Ben. Monroe, 642–692.

"The plaintiff Waller, before the repealing act was passed, had on the faith of the lottery grant advanced large sums of money which were appropriated by him for the benefit of Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. As the lottery privilege was granted for the benefit of the Shelby College and the
86 money was advanced by Waller, with the assent of the trustees of the college, under the belief that it would be realized eventually from the lottery, he, Waller, became thereby invested with a right to use the grant until from such use the sum was produced which he had advanced for the benefit of the college. This was a vested right, of which he could not be divested by an act of the legislature. So far, therefore, as the repealing statute interferes with or affects this right it is unconstitutional and inoperative; but as the lottery privilege is only saved from the operation of the repealing act by the existence of this right and to the extent thereof,

it follows as a necessary consequence that the grant has been repealed, except so far as it may be needed for the purpose of raising the sums of money which Waller had advanced for the benefit of the college before the passage of the act. Whenever that object shall have been accomplished the right to use the privilege will then have ceased and determined. As, therefore, the lottery grant was not entirely repealed by the provision of the Revised Statutes, but the privileg- might still have been used for the purpose of raising the amount due to Waller, the appellant for the reasons before mentioned was not entitled to any further relief than that which she obtained by the judgment of the court below.

"Wherefore said judgment is affirmed."

In the case of J. N. Webb *vs.* The Commonwealth, which was an action instituted by the attorney general on behalf of the State, in the Franklin circuit court, and afterwards transferred to the
87 Oldham circuit court, in the nature of a *quo warranto* against S. T. Dickinson and others, as vendees of said managers, the court of appeals adjudged, in reference to the Henry Academy and Female College grant, that under the act of 1850 the right to operate said lottery was legally granted; that the sale to Gregory and Gregory's assignees by the managers was legal and valid, and that section 6 of article 21 of chapter 28 of the Revised Statutes, by which it was provided "That all rights and privileges which had been granted by the legislature of Kentucky to raise money by lottery for any purpose should cease and determine," was void and of no effect as to the said purchase of Gregory and his assignees and vendees; that the said Gregory, having purchased the said privilege from the said managers, acquired by said contract a vested right which could not be repealed by subsequent legislation. In the case of the Commonwealth *vs.* Douglas the defendant in this action, indicted in the Jefferson circuit court for operating the lottery franchise in question, on appeal by the Commonwealth from the judgment of the Jefferson circuit court dismissing said indictment, the court of appeals on the 25th day of November, 1882, in the opinion of the court affirming the judgment of the court below, use- the following language: "The opinion of this court in the case of J. N. Webb *vs.* The Commonwealth, delivered September 11th, 1878, is conclusive of the principal questions raised in this case. That case was between the same parties in interest here, was decided upon its merits on facts admitted in the pleadings, and establishes the following propositions as the law applicable to the lottery
88 grant, approved December 9th, 1850, authorizing the raising of $50,000.00 for the benefit of the Henry Academy and Henry Female College:

"1. That the grant was not repealed by the Revised Statutes which went into effect July 1st, 1852.

"2. That the transfer to Gregory by the trustees and by Gregory to Simmons and Dickinson vested in the latter the right to raise by lottery the sum of $50,000.00.

"3. That there has been no use made of the franchise up to the 14th of February, 1877, the time at which the pleadings were com-

pleted in the Webb case, and therefore no question of exhaustion prior to that time could arise.

"The instructions of the court below and the rulings of the court in the admission and rejection of evidence were in conformity to the three propositions stated, and therefore no error was committed to the prejudice of the Commonwealth. Judgment affirmed."

In the case of The Commonwealth *vs.* The City of Frankfort, decided January 27th, 1878, by the court of appeals of Kentucky, it was held that under the act of 1869 a lottery franchise was created and conferred upon the board of councilmen of the city of Frankfort for the purposes enumerated in this action. It was further held that under the act of 1872 the city of Frankfort was authorized to sell and convey the lottery franchise, and that by the contract of December 31st, 1875, between the board of councilmen and the mayor of the city of Frankfort on the one part and E. S.
89 Stewart on the other part the franchise was sold and conveyed according to the terms and provisions of that contract, and that the contract was in accordance with the provisions of the enabling act which conferred the power upon the city of Frankfort to sell the franchise, and affirmed the judgment of the court below. In the opinion of the court, rendered by Judge Elliott, in sustaining the constitutionality of the act of 1869, conferring upon the board of councilmen of the city of Frankfort the said lottery franchise, — said: "Certainly the education of the youth of Frankfort related not only to the city but to its future prosperity and welfare, and we are of opinion that the provisions of the 18th section of the act of 1869 were fully covered by its title when construed in the light of the decision of this and other courts of the Union. * * * If the lottery franchise is immoral in its tendency the legislature must interfere. This court can construe and decide what the law is, but it has no power either to make a law or to repeal one already made by judicial construction."

Under his contract of purchase of the 31st of December, 1875, of the said franchise from the city of Frankfort, E. S. Stewart through whom the defendant claims, in compliance with the requirements of the said contract of purchase, executed his bond to the Commonwealth of Kentucky, with four approved sureties, in the penal sum of $100,000.00 in accordance with the requirements of the act of March 28th, 1872, authorizing said sale. The bond covenanted that in consideration of the contract and the provisions of the
90 acts of the General Assembly referred to the said Stewart and his sureties bound themselves to faithfully comply with the provisions of the said act, and also to pay the sums stipulated in the said contract to be paid to the city of Frankfort and for the payment of all prizes that might be drawn in any class under said scheme, and the said bond was to be void upon the full compliance on the part of the said Stewart with all the conditions of said contract. It is unnecessary to reproduce here the proceedings of the general council of the city of Frankfort relative to the said contract. Suffice it to say they were in every respect regular and in conformity with the requirements of the act of 1872 authorizing the

said sale. The bond executed by Stewart was received by the city of Frankfort as sufficient and was filed in the Franklin county court in accordance with the provisions of the act, thus making the contract between the city of Frankfort and the said E. S. Stewart an executed contract. The title and the franchise thereunder passed and vested in the said Stewart by virtue of said contract. It is superfluous and nugatory to argue that the creation of the lottery franchise by the law-making power of this Commonwealth and its subsequent purchase by E. S. Stewart from the original grantee was immoral, illegal, or contrary to the public policy of the State, for, as we have seen, it has received the sanction of the highest judicial authority of the Commonwealth. The title of the defendant Douglas, derived through E. S. Stewart, to the lottery privilege is
91 an intervening vested right of property arising out of a contract of purchase expressly authorized by the State, for which he has paid the city of Frankfort and the city of Frankfort has received a valuable consideration, not only in money paid, but in the risks and obligations and liabilities incurred by the defendant under the said contract of purchase. The obligatory force of the contract of purchase under which the defendant claims to operate the franchise he purchased from the city of Frankfort is derived not only from the contract itself, but from the statute of the Commonwealth authorizing the sale of said franchise or privilege. The court of appeals of Kentucky has said that the responsibility belongs to the State that created and granted the lottery franchise in the first instance and afterwards by express statute authorized a contract of sale of the same, out of which has arisen vested contract rights of property in the defendant Douglas; that general notions of the policy or impolicy of the original grant as made and of the contract as afterwards authorized and executed come too late when vested rights of property resting upon the obligatory force of said contract have been created. The question is, Has the law-making power of the State constitutional authority, competency, or jurisdiction vested in the legislature or in the constitutional convention to impair the obligation of said contract and thereby destroy the vested rights of property in the said purchaser resting thereon? The question is, Has the State of Kentucky, through her legislature or by her constitutional convention, the constitutional power to annul a contract between the city
92 of Frankfort and E. S. Stewart and divest him and his assignees of his property rights under his said contract without their default and against their will and without making them compensation therefor? The defendant insists that this cannot be done, and that to allow such would be a flagrant violation of the principles of justice and of the Federal Constitution which secures to every citizen the full enjoyment of his contract rights against encroachment or invasion by the States. The fact is the legislature of Kentucky made this lottery privilege the legitimate subject of contract, valuable and vendable in law, by authorizing its grantee, the city of Frankfort, to sell the same. It invested the said lottery privilege with the attributes and essential incidents and character of a legal

estate by making it vendable in the hands of its grantee and making it subject to State and municipal taxation. It thus converted a revocable grant in the hands of its grantee, the city of Frankfort, into a valuable legal estate irrevocable in the hands of a purchaser for value under the contract authorized by the State, and thereby the said contract and the rights of property, resting upon the legal force of its obligations, were placed under the shielding protection of the Constitution of the United States, as much so as any other species of property or contract was ever placed against impairment or invasion by State authority. The authority conferred by the State upon Frankfort to sell the franchise or privilege implied an obligation on its part not to take away or destroy the thing sold.

93 It must be presumed that the State understood the legal effect of the contract of sale which it authorized the city of Frankfort to make, which was to vest in the purchaser the legal title to the subject-matter of the sale, a title resting in contract and growing out of and depending upon the validity and inviolability of its contractual obligations.

The integrity and perpetuation of human society rest upon the inviolability of contracts. All the obligations of social and civil life, all rights, duties, and obligations, individual, State, and national, rest upon the sanctity of contracts and depend upon their sacred observance and fulfillment. It has been well said that the degree which a State marks in the scale of civilization may be accurately measured by the strictness with which its laws construe, interpret, and enforce contracts. Said Mr. Justice Swayne in Farrington *vs.* Tennessee, 5 Otto, 682, in delivering the opinion of the Supreme Court of the United States: "Compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They *guage* the confidence of man in the truthfulness and integrity of his fellow-man. They are the springs of business, truth, and commerce. Without them society could not go on. Spotless faith in their fulfillment honors alike communities and individuals. Where this is wanting

94 in a body politic the progress of descent has begun and a lower plane will be speedily reached. To the extent to which the defect exists among individuals there is decay and degeneracy. As are the integral parts so is the aggregated mass. Under a monarchy or an aristocracy order may be upheld and rights enforced by the strong arm of power, but a republican government can have no foundation other than the virtue of its citizens. When that is impaired all is in peril. It is needless to lift the vail and contemplate the future of such a people. Trist *vs.* Child, 21 Wall., 441; Montesquieu's Spirit of Laws, 25. History but repeats itself. The trite old aphorism that 'honesty is the best policy' is true alike of individuals and communities. It is vital to the highest welfare."

If one citizen violates his contract with another or destroys the property of another, the law furnishes a remedy in the courts of the

State. If one nation violates its contract with another nation or commits a wrong, whether by contract or trespass upon the rights of its foreign subject or citizen, the government, the property rights of whose citizen are thus violated, upon well-recognized principles of international law may have recourse to measures of retaliation, reprisal, or to open war for redress. Phillimore International Law, page 29. If one nation takes possession of what belongs to another or if she refuses to pay a debt or to repair an injury or to give adequate satisfaction for such injury to the property rights of another nation or to the property rights of the subjects of
95 another nation, the latter may seize something belonging to the former and apply it to her own advantage until she obtains payment for what is due her or to her citizens, together with interest and damages, or keep it as a pledge until she has received ample satisfaction. Vatt-l's Law of Nations, page 283. As between nations the property of the individuals is considered as the property of the nation, and accordingly in every civilized State a subject or citizen injured by a foreign nation in his property rights has recourse to his sovereign, who will demand justice from the offending nation or make reprisals, for every nation is bound to protect its own citizens whose case is its case. Vatt-l's Law of Nations, 285. This principle of international law was recognized in 1855 by the United States Government in the instructions which Mr. Marcy, Secretary of State, gave to Mr. Clay, minister of the United States at Lima, and by President Jackson in his message to Congress in December, 1834, in which he stated it was a well-settled principle of international law that where one nation is under a contractual obligation to another which it refuses to recognize the aggrieved State may seize on property belonging to the other, its citizens or subjects, sufficient to pay the debt without giving just cause of war. This principle of international justice was recognized by the mixed commission organized under the convention of the United States with England in 1853 in the case of a British subject who had received before the annexation of Texas bonds secured by the pledge of the faith and revenue of that State.
96 It was held that the United States was bound to see that the obligations of Texas to British subjects were fulfilled. In 1847 a motion was carried through the House of Commons for the issuance of letters — mark and reprisal against Spain because of her repudiation of Spanish bonds owned by British subjects. In the matter of the Silician loan, in the argument of the English civilians against the reprisals made by the King of Prussia on account of the capture of German vessels by the cruisers of Great Britain, it was stated that "it would not be easy to find an instance where a prince had thought fit to make reprisals upon a debt from himself to a private man. There is a confidence that it will not be done. A private man lends money to a prince upon an engagement of honor, because a prince cannot be compelled, like other men, by a court of justice. So scrupulously did England and France adhere to this public faith that even during the war terminated by the peace of Aix-la-Chapelle they suffered no inquiry to be made

whether any part of the public debt was due to the subjects of the enemy, though it is certain that many Englishmen had money in French funds and many Frenchmen had money in English funds.

In speaking of the report of the English civilians Vattel demonstrates it "*un excellent morceau de droit des gens.*" Montesquieu calls it a wise reply, "*une response sans replique.*"

In the case of The United States *vs.* Dickelman, 2 Otto, 524,
97 Mr. Justice Waite, in delivering the opinion of the court, said: One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty except in performance of his obligations by treaty or otherwise, voluntarily so made. Hence citizens of one nation wronged by the conduct of another nation must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts as of right, but by diplomacy, or, if need be, by war.

We have cited these familiar principles of international law to show that as between nations violations of contract, like violations of treaties, are *casus belli*, and this not only with reference to international contracts, but with reference to the individual rights of property of the citizen or subject of one nation where they are violated, annulled, or destroyed by the acts of a foreign government.

As between the States of this Union their contractual obligations are vindicated, not by letters of mark and reprisals or declarations of war, but under the Constitution of the United States in the Supreme Court, which is a court of original jurisdiction for the enforcement of such contracts. As between the citizens of one State and the citizens of another State their contractual disputes may be de-
98 cided by the State or Federal judiciary, but as to disputes between a State and her own citizens or between citizens of the same State they are subject to the judicial arbitrament of the State laws, administered in the State courts, save and except where the State undertakes to commit a wrong upon her own citizens inhibited by the Constitution of the United States. To take property wrongfully and by force from a man is robbery; if committed by an individual, the wrong-doer is a felony and amenable to the penal laws of the State; when committed by one nation against another nation or the citizens of another sovereignty it is, as we have seen, a *casus belli*, but when a State sovereignty attempts to destroy the contract rights of property of its own citizens he can shield himself under the safeguards of the State or Federal Constitution which may be invoked in the tribunals of his own State and by appeal, if he desires, to the Federal judicial tribunals.

It is undoubtedly true, both under the State law and under the present constitution of Kentucky, that the Commonwealth could revoke the grant of the lottery privilege in the hands of its grantee,

the city of Frankfort, for, as between the State and the said city of Frankfort, the right to operate the lottery, although conferred by the Commonwealth upon a highly meritorious consideration and for a public use, was a mere revocable legislative indulgence and not a vested right of property; but if the State had entered into a contract with the city of Frankfort and had not made a merely gra-
99 tuitous grant—in other words, if the franchise had been sold by the State for a valuable consideration to the city of Frankfort as a purchaser—it may well be doubted whether the State could have afterwards destroyed the obligations of its contract by destroying the subject-matter which it had sold. In the case of a gratuity the licensee is a mere tenant at will or by sufferance, *durante bene placito*. In the hands of the grantee the privilege is not a property right, but a mere revocable indulgence, just as it is the tenure of a tenant at will or by sufferance. The landlord in such a case can at any time terminate such a tenancy, but if the owner of the fee expressly authorized his tenant at will or by sufferance to sell his right of occupancy for a definite period or for a particular purpose to a third party for a valuable consideration, will any lawyer say that the purchaser acquires no higher estate nor more valuable vested right of property than the tenant at will or by sufferance had? The landlord may enter at his pleasure against his tenant at will or by sufferance, but the right of sufferance merges into a legal right of property to the possession when the tenant by sufferance or at will, under direct authority from his landlord, sells the estate to a third part- for value for a particular time or for a particular purpose. The franchise or privilege conferred upon the board of councilmen of the city of Frankfort by the act of 1869, it is conceded, is not a grant within the meaning of that term as used in Fletcher *vs.* Peck. "A grant," said the Supreme Court of the United States
100 in that case, "is in its very nature an extinguishment of all the rights of the grantor, and implies an obligation not to reassert that right. It is not claimed by the learned counsel for the defendant that the right of the lottery privilege under the act of 1869 is such a one. The privilege in the first instance to the city of Frankfort was a revocable power, but when sold by the city under an express act and by the express authority of the State the power to operate the privilege in the hands of the purchaser for value is a power coupled with an interest, a legal estate in his hands, which cannot be revoked or confiscated by the State, although in the first instance the privilege was conferred, as we have seen, upon the city of Frankfort by the Commonwealth for the purpose of reimbursing that city for monies of which it had been despoiled by the State, and was created for declared objects of public utility. It is conceded that the privilege or grant was a mere revocable gratuity touching a matter over which the State possessed plenary jurisdiction under its recognized public powers; but it is an artful theory and one expressly repudiated by the court of appeals of this State in the decisions cited and in decisions which I shall cite further along that because the regulation of suppression of lotteries is within the undisputed police jurisdiction of the Common-

wealth, that therefore all contract vested rights of property that may intervene touching the same may be abrogated at the will of the sovereign. Where the State, after the establishment of
101 such a privilege, confers upon its grantee the power of converting the privilege or immunity into a legal estate by selling it for value to a third party, and then taxes it as property in his hands under State and municipal tax laws, the proposition that the State may divest the title and confiscate the property rights of the purchaser in the said privilege against his will and without making him compensation therefor is neither sound in morals, in logic, nor in constitutional law.

"No State," says the Constitution, "shall pass any law impairing the obligations of contracts." This inhibition and constitutional disqualification applies as well to the constitution of a State as to the acts of its legislature. Dodge *vs.* Woolsey, 18 Howard, 331. Indeed, it was not contended at bar and will not be contended by counsel that there is a whit more potency or validity in the ordinances of the constitution of a State, which in effect impairs the obligations of a contract, than there is in the like acts of its legislature. The Supreme Court of the United States in many cases has decided this express point until it is no longer a question. In Gum *vs.* Barry, 15 Wallace, page 610, Mr. Justice Swayne, delivering the opinion of the court, holding that the first section of the seventh article of the constitution of Georgia adopted in 1868 was unconstitutional and void, so far as it affected the contract rights of the appellant, John Mck. Gunn, after quoting section 10 of article 1 of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts," said: "The legal remedies for the enforcement of
102 a contract which existed at the time and place where it is made are a part of its obligation. A State may change them, provided the change involves no impairment of a substantial right. If the provision of the Constitution or the legislative act of a State fall within the category last mentioned they are to that extent utterly void. They are for all the purposes of the contract which they impair as if they had never existed. The constitutional provision and the statute of the State of Georgia here in question are clearly within that category, and are therefore absolutely void," and reversed the judgment of the supreme court of the State of Georgia. See also White *vs.* Hart, 13 Wallace. Where there is an investiture of an estate dependent upon the growing out of the enforcement of the obligations of a contract to destroy the estate or property is not only to impair, but to annul the obligations of the contract. Such an estate or legal right of property resting in contract, being legal at the time of its creation, cannot be touched by hostile hands, however ill-advised may have been the law allowing its creation. The safeguards of the Federal Constitution are around it and above it to shield and protect it against encroachment and impairment by the State government. To annul a contract and snatch away the rights of property created thereby, without making compensation therefor, because the State which created the estate in the first

instance and authorized its sale by its guarantee has, since said contract was executed, changed its policy and views as to the morale of the business, would be a confiscation more shocking to
103 decency, honor, and justice and more pernicious and demoralizing in its effect upon public sentiment than the operation of all the lotteries which the Commonwealth has created since its organization as a State. Because the abolition of lotteries is a desirable end, are the courts to trample down the constitutional safeguards thrown around the sanctity of contracts and destroy vested rights resting upon them in order to accomplish the desired end? Is this the policy or morality of the law? If such a doctrine as this is to receive judicial sanction, what is to be the consequence? Are contracts at the mercy of legislative caprice? How calamitous the consequences that must follow from the adoption of such a principle by the courts. The ends justify the means. While its suppression in this particular instance might be cheerful and pleasing to many, who can foretell in what direction or against what other contract rights legislative or political caprice, whim, or prejudice may direct its baleful operation in the future? Who can define the sphere within which its obliating energies shall be curtailed? Trample down the barrier of the Constitution thrown around contracts, strike down the safeguards of the Constitution thrown around the personal safety, the personal liberty, and the private property of the citizens at the behest of public sentiment and what civil right of the citizen is safe?

The framers of the Federal Constitution in erecting that impregnable bulwark, section 10 of article 1 of the Constitution of
104 the United States, for the safety and protection of the contract rights of every citizen of the Union against impairment and annullment by State authority, were not unmindful that the legislatures of States and even their constitutional convention might sometimes act under the strong impulses of public passion and prejudice and political excitement, sometimes inadvertently, and that ofttimes the good intentions of the many would be misled by the unscrupulous management and intriguing talent of cunning demagogues and unreasoning enthusiasts. They were mindful that the policy of the States by which their public councils are directed would fluctuate with the changing temper of the times, and that political caprice and public sentiment would dictate legislation in violation of the contractual obligations of the citizen; therefore it was that they imbedded in the supreme organic law of the Union the prohibition against any State, either by its constitution or legislative enactment, passing any law impairing the obligation of contracts. It was a maxim of Bractom, taken from the civil law that they crystalized into the supreme law of this land, that the law-giver could never alter his mind to the prejudice of a vested right. (*Nemo potest mutare consulium suum in alterius injuriam.*) Every judge of a State court in the Union is bound to uphold and protect this provision of the Federal Constitution, even though in doing so it may sometimes become his duty to declare the enactments of the State legislature and the provisions of the consti-

tution of his own State inoperative as in conflict therewith. Were
the judge of a court a Roman prætor under Justinian, whose
105 edict was the law of the case, or the viceroy of an Asiatic
prince, a Persian satrap, a Turkish pashaw, or a minion of the czar of Russia, he might disregard the supreme injunction of the Federal Constitution by applying to himself the memorable sentence of the Roman pontiff, "*Licet hoc de jure non possumus, volumus tamen de plentitudine potestatis,*" and declare the law according to his own notion of right and wrong. Such is not our frame of government nor the duty of its judiciary. The self-evident truth will not be denied that it was perfectly competent for the State to create and bestow the license in question upon the board of councilmen of the city of Frankfort. It is equally manifest and undeniable that the State had authority and did empower the city of Frankfort to sell the grant, and the demurrer admits that the board of councilmen of Frankfort, by regular proceedings in conformity to the requirements of the act, did sell the privilege to E. S. Stewart by a valid binding contract, and the property, the subject-matter of that contract, passed under it and vested in E. S. Stewart, the purchaser, an estate resting in contract which cannot now be destroyed without breaking down those constitutional defenses under the provision of the Federal Constitution above cited which secures to every citizen in the Commonwealth the enjoyment of that to which he holds legal and equitable title against encroachment and spoliation by the State. The State cannot arbitrarily impair and repudiate the obligations of the contract between the city of Frankfort and E. S. Stewart with refer-
ence to the lottery privilege purchased by him upon the
106 barren pretense that in so doing it is only exercising an unvendable police power over public morals. By authorizing the city of Frankfort, its grantee, to sell the said privilege to a purchaser for value, it withdrew the subject-matter of the sale from under its police surveillance and invested it with the elements and essential attributes of a contract right over which it had no jurisdiction or power of annulment when in the hands of a purchaser as a vested estate. Certainly the Commonwealth's power and control over the public revenue and over the entire subject of taxation is an element of sovereignty as fundamental and unvendable as its control over matters of police. Yet when the power of taxation is delegated by the State to a municipality for the purpose of enabling it to issue and float its bonds, no subsequent act of the State revoking the power of taxation conferred upon the municipality is valid against an intervening purchaser of said bonds until his contract right to have said bonds paid by municipal taxation is satisfied. To the extent of the vested contract rights of the bondholder to have the municipality exercise its delegated right of taxation for the payment of said bonds, the Commonwealth has lost its political authority over the subject of taxation conferred upon said municipality. Undoubtedly as between the State and the municipality the delegated power of taxation could be controlled and resumed by the legislature in virtue of its sovereignty. Indeed, the

State could abolish the municipality as a corporate entity al-
107 together and annihilate the delegated authority conferred upon it, but the purchaser of the bonds of the city has a vested contract right in the enforcement of the city's delegated right of taxation under the statute conferring the power upon said municipality to tax the people for the payment of the bonds, principal and interest, which the State, in the exercise of its sovereignty, could not impair or revoke. By conferring upon the city the power of levying a tax for the payment of the bonds, the State would remove the subject of taxation as delegated from under its unvendable political power to the extent of the vested rights of a purchaser of said bonds to have them satisfied by an enforcement of the power of taxation delegated to the city. This was expressly decided by the Supreme Court of the United States in Von Hoffman *vs.* The City of Quincy, 4 Wall., 535, and it may be remarked with somewhat of pride to Kentucky that the Supreme Court in the case cited rested its decision upon the case of The Covington & Lexington R. R. Co. *vs.* Kenton County Court, 12 Ben. Monroe, 147, *supra.*

In The Sinking Fund *vs.* Green and Barren River Navigation Company, 79 Ky., 73, the legislature, by an act passed in April, 1880, undertook to impair a contract between the State and said company, made in 1868, by repealing the former act. Judge Pryor, in delivering the opinion of the court, held that the Green and Barren River Navigation Company had vested rights of property by reason of its charter which it was not competent for the legislature to impair. Said he: "The only question is, had the legislature the power to annul the contract? We think not
108 and must adjudge that the act of the 8th of April, 1880, is unconstitutional and void. * * * That the right of the said company to the tolls and benefits of this line of navigation originated from the contract made with the State, and any legislation impairing its obligation without the consent of the appellee is a violation of the Constitution."

In Whipps *ads.* The Commonwealth, 80 Ky., 271, which was a prosecution under indictment of Whipps for operating a lottery authorized by an act of 1880 for the purpose of disposing of the Willard hotel for the benefit of his creditors, Judge Pryor, in delivering the opinion of the court, among other things, said: "Lottery grants are now in existence in this State and their constitutionality has never been denied. * * * The motive prompting the legislature to make the grant cannot be inquired into by this court. Plenary power in the legislature for all purposes of civil government is the rule with uncontrolled authority in making the laws within the limits of the constitution. This court has nothing to do with the moral question involved; if it had the case could be easily disposed of. The legislature makes, the executive executes, and the judiciary construes the laws."

(Citing Cooley on Constitutional Limitations.)

The facts of the case were these: Whipps was involved in debt and the legislature upon his application granted him the privilege

of selling his property by lottery at a single drawing, the proceeds to be applied to the payment of his indebtedness. The Commonwealth, after making the grant, indicted Whip-s for proceed-
109 ing to act under it, and insisted that he should be fined in a sum not exceeding $10,000 for promoting a lottery. The court of appeals, speaking through Judge Pryor, held that the penalty could not be enforced against Whipps. To the same effect is the case of The Public Library of Kentucky *vs.* A. W. Littell, decided in 1877, Judge Lindsay delivering the opinion of the court. Speaking of the lottery grant in this case, Judge Lindsay said: "The responsibility for the evils resulting from legislation like this rests with the law-makers and not with the courts, and it is neither their duty nor their right to undertake to correct or limit such evils by encroaching on the exclusive domain of legislative power. The lottery grant is not void by reason of the provisions of section 32, article 2, of the State constitution. It is a legitimate, although it may be an objectionable, mode by which to raise the funds necessary to establish the free library."

In Phalan *vs.* Virginia, 8 Howard, 163, the opinion of the Supreme Court of the United States was delivered by Mr. Justice Greer. The legislature of Virginia had authorized the raising of the sum of $30,000 to build three miles of turnpike road in Fauquier county, in that State, in December, 1828. By an act of the legislature of Virginia approved the 29th of February, 1834, for the suppression of lotteries, severe penalties were denounced against the operation of lotteries and the sale of lottery tickets in that State after the 1st of January, 1837, with the following proviso to said act: "Provided, nevertheless, that nothing herein contained shall be construed to extend or interfere with any con-
110 tract which may hereafter be made under or by virtue of any existing law authorizing the same for the drawing of any lottery, the drawing whereof shall not extend beyond the 1st day of January, 1840." After the passage of this prohibitory and penal statute two commissioners were appointed under an act approved the 11th of March, 1834, to carry into effect the act of the 30th of January, 1829. On the 19th of December, 1839, the said commissioners entered into a contract with Phalan and another authorizing them to draw as many lotteries as they might think proper, paying to the commissioners the sum of $1,500 a year. It will be observed that no contract had been made under the act of 1834 at the time when this subsequent repealing act was passed. Judge Greer, in delivering an eloquent malediction against lotteries, in his opinion, when he came to speak of the repealing act of the Virginia legislature, said: "When the legislature of Virginia passed this most salutary act for the suppression of lotteries they with commendable caution protected all vested rights."

In the case of State *vs.* Phalan & Paine, 3 Harrington (Delaware court of errors and appeals), page 451, the facts were these: In 1827 the legislature of Delaware passed an act granting to certain-named managers the power, privilege, or franchise of operating a lottery to raise $10,000 to be applied by said managers to the build-

ing of an academy and Masonic hall, and the surplus, if any, to the finishing St. Paul's Episcopal church, in the town of Georgetown, in said State of Delaware. Section 3 of said act conferred on
111 said managers the power and authority to sell and dispose of said lottery privilege or franchise or any class or classes thereof.

On the 14th day of January, 1839, the said managers, under and by virtue of the authority conferred upon them by the act of 1827, sold the said lottery privilege for the term of five years to James Phalan and Daniel Paine for $10,000, to be paid in ten semi-annual payments, beginning the 1st of March, 1839. In said contract of purchase by Phalan and Paine it was provided "if James Phalan and Daniel Paine or their assigns shall be prevented by judicial or legislative interference from drawing said lottery in the State of Delaware during said term of five years, then the contract, if they so elect, to be void and of no effect; otherwise to remain in full force and virtue."

By section 1 of an act of the legislature of Delaware passed in 1841, two years after the sale of the lottery privilege to Phalan & Paine, it was provided that the contractor or contractors for any lottery authorized by any law of the State shall, immediately upon the drawing of each and every scheme or class of such lottery, or within ten days thereafter, pay the sum of $10 for each and every scheme or class so drawn to the trustee of the school fund, to be applied to and for the benefit of the fund for the establishing of schools in the State of Delaware, and the further sum of $50.00 upon the drawing of each and every scheme to be applied upon the fund to be raised by said lottery.

The action — brought in the name of the State against
112 Phalan and Paine to collect said sums due under the act of 1841 for the benefit of the school fund of the State of Delaware. Phalan and Paine, the purchasers of the lottery privilege and defendants in the action, resisted the collection of the said sums upon the ground that the act of 1841, under which the action was brought, impaired the obligations of their contract of purchase of said lottery privilege from the managers or first grantees of the State. The question was reserved for hearing before all the judges of that eminent court, composed of Richard H. Bayard, chief justice, with Associate Justices Booth, Johns, Harrington, Layton, and Milligan. The State was represented in the action by Edward W. Gilpin, attorney general of the State.

The opinion of the full court, delivered by Mr. Justice Johns, holding the act of 1841 to be — contravention of section 10 of article 1 of the Constitution of the United States as impairing the obligations of the contract of purchase between Phalan and Paine and the managers of the lottery, used the following language: "We all agree that the act of 1827, authorizing the lottery to be drawn, is neither a grant nor a contract. It is a bare delegation of authority by which the drawing of the lottery is sanctioned until a certain amount or sum shall be raised for a certain purpose. If the act had confined the authority to the simple agency of the managers on

behalf of the State, the question now presented might not have
curred; but in the act we find the managers are empowered to ra
the sum of $10,000 either by drawing the lottery themsel
113 or through their agents or by a sale of the powers granted
the lottery act. Hence, although we regard the act as ma
ing no grant or contract with the managers, we cannot disrega
the authority granted to them to make a contract with others fo
valuable consideration which would be binding on the Sta
While the authority or power delegated remained in the hands
the managers or agents of the legislature it was subject to the co
trol of the legislature, either to repeal, modify, or change. As
mere letter of attorney it could be revoked; but from the time wh
a contract was made under the authority conferred by the act
make a sale a new state of things took place; an authorized contra
between the managers and third persons for a valuable consider
tion conferred new rights and imposed new obligations. The co
tract, having been made in pursuance of the powers contained
the letter of attorney and in strict conformity therewith, as also
give effect to the purpose therein intended, must be obligatory upo
the principal; nor under such circumstances can it be compete
for the principal, even should he revoke the letter of attorney,
annul or even impair the contract; its obligation rests upon him
strongly as if he had himself primarily made it and received th
consideration paid.

Regarding, therefore, the legislature as the principal under who
authority the act of 1839 was made, we do consider they had n
right to violate this contract or so revoke or modify the contract a
to impair its obligation; but the act of 1841 does not assume to r
voke its authority, but to modify by regulating the exerci
114 of the powers delegated after the same had become the pro
erty of third persons as purchasers by sale, that act reco
nizing the existence of certain lottery grants as under contract, an
affirming that with respect to such they had no right to prohibi
* * * Upon such a contract and the rights vested and exercise
under it after the lapse of two years from its execution, the legisla
ture, by the act of 1841, declared that all persons drawing lotterie
should pay to the school fund $10 for each drawing and $50 to th
parties entitled to the purchase-money to be credited on accoun
thereof. The simple question we have to settle in the present cas
is, does this addition of $10 on each drawing and variation of th
time of payment of the installments of the purchase-money b
requiring $50 thereof to be paid at each drawing interfere with th
contract made with Phalen & Co. in the year 1839, so as to impai
the obligation thereof? It has been said that this was no additiona
charge impairing the contract, because it would come in as a charge
and the defendants would have the right to draw on to realize th
additional sum. We entertain a very different opinion. The par
ties by their contract agreed to no such thing. The defendan
agreed to pay $10,000 for the privileges of the lottery act of 1827 with
the then existing charges. If the legislature could add $10 on each
drawing they might add $1,000. It is a question of power and no

of amount. So as to the imposition of $50. If they can vary the time of payment of a part of the purchase-money, why not the whole. But we consider it out of duty to say the legislature had no right thus to add to or vary the contract of 1839, and that
115 such addition and variation thereof, as it increases the amount which the defendant agreed to in five years to pay for the exercise of a privilege during five years, and also varies the mode and time of payment of the sum agreed to be paid, it necessarily has the effect of impairing the obligation of the contract. Independent of the Constitution of the United States, the act, although clearly contrary to right and incapable of being sustained, yet as the act of a sovereign power might be valid, for it is not always that power regards right. Experience teaches that power unlimited often tramples upon and disregards private right; but when we turn to the clause in the Constitution of the United States which appears there inserted as a shield and defense against all legislative action by a State impairing the obligation of contracts, we feel authorized to say not only that the legislature had no right, but they had no power, to regulate in the manner attempted by the act of 1841 the existing contract of 1839."

In The State of Missouri *vs.* Miller, 50 Mo., 129, the State of Missouri, through its legislature, by an act passed in 1833, had conferred upon the town of New Franklin, in that State, the right to raise money by lottery for the purpose of aiding in the construction of a railroad from that town to the Missouri river. By an act of 1835 power was conferred upon the town of New Franklin to sell the lottery franchise for the purposes aforesaid. In 1842 Walter Gregory purchased the said lottery grant under the authority of the act of
1835. Afterwards by a constitutional ordinance almost identi-
116 cal with section 226 of the present constitution of Kentucky, the lottery grant to the town of New Franklin was revoked and the operation of all lotteries prohibited in that State. Gregory sold the lottery privilege which he had purchased from the town of New Franklin to George Miller, and Miller was indicted and convicted in the court of criminal correction of St. Louis for selling lottery tickets under the New Franklin lottery grant which he had purchased from Gregory as aforesaid. On appeal, reversing the decision and directing Miller to be discharged, Judge Wagner, of the supreme court of Missouri, held that the transfer of the lottery to Gregory in 1842 constituted a valid contract, which could not be impaired by subsequent legislation. Said he: "Where a contract when made is valid by the laws of a State as then expounded by the departments of the Government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the legislature or decision of its court altering the construction of the law. The establishment and continuance of a lottery is doubtless an evil, but its abolishment by throwing down the legal barriers which have been built up for the protection of the citizen and his property would be a still greater evil."

In the case of The State *ex rel.* The Attorney General *vs.* Miller,

66 Mo., page 329, Mr. Justice Norton, delivering the opinion of the court, said: "Public corporations are the auxiliaries of the State in municipal government, and neither their existence nor their
117 privileges rest upon anything like a contract between them and the legislature, but when such a corporation by authority of the State contracts with a third person, whereby rights become vested in such person, they cannot be divested by the State." This last case was a proceeding in the nature of *quo warranto*, just as is the case at bar, exhibited by the attorney general of Missouri on behalf of the State *vs.* the defendant, George Miller, in which it was alleged that he, the said Miller, without warrant and in violation of law, was engaged in selling lottery tickets under a pretended franchise, and praying that he be required to appear and show by what authority he assumed to exercise the said right. Miller in the case of the *quo warranto*, as in the criminal prosecution against him in the said State above cited, was operating a Missouri State lottery under the Gregory contract of June, 1842, purchased by Gregory from the town of New Franklin. Said Judge Norton, among other things: "So long as the power conferred by the act of 1835 upon the trustees of the town of New Franklin to contract with other persons for the drawing and managing said lottery remained unexecuted by them, the State through its legislature could have taken from the town of New Franklin the right to raise money in that way, such right being a mere bounty, subject to recall or repeal without such repealing law being obnoxious to the prohibition against the passage of a law impairing the obligation of contracts. When, however, this power is executed (the power to sell the franchise) and a contract concluded whereby a third person acquires the
118 right to conduct and manage a lottery another and a different question is presented, and the rights thus acquired become vested by the act of the State and cannot be taken away except by the terms of the contract" (citing State *vs.* Miller, 50 Mo., 129; Clark *vs.* Mitchell, 64 Mo., 576). * * * "As to the impolicy," continued Judge Norton, "of the act of the General Assembly in granting the privilege it did to the town of New Franklin, whereby the sale of lottery tickets has for years been authorized against the sense of the people of the State and to the debauchery of the public morals, we have nothing to say. Nor have we anything to do with the fact that the trustees in making the Gregory contract and the legislature in ratifying them have acted unwisely and continued till the year 1877 a business yielding large profits and gains to one contracting party and comparatively small to the other. We are to look at the contract, and, if fairly made, uncorrupted by fraud and untainted by illegal considerations, it is our duty to enforce and uphold the legal rights which it confers. Security to the rights of persons and property demands a strict adherance to this rule and it cannot be overreached, even though the purpose be to correct a supposed or real great evil."

In Miss. So. of A. & S. *vs.* Musgrove, 44 Miss., Judge Simrall, delivering the opinion of the court, said: "The State may take away

by statute what has been given by statute unless rights under it have vested. If the legislature delegate authority it can evoke it if nothing has been done under it which creates a vested right.
119 * * * The authorities are abundant that the legislature may repeal a lottery grant unless contracts have been made or rights vested as between the grantee and other parties which could be infringed by the repealing law. (Citing Gregory's Executors *vs.* Trustees of Shelby College, 2 Metcalf, 589; State *vs.* Hawthorne, 19 Mo., 391; State *vs.* Freleigh, 8 Mo., 615.)

To the same effect and touching a subject wholly within the police powers of a State is the decision of the Supreme Court of the United States in the case of Joliffe *vs.* Steamship Company, 2 Wallace, 450, opinion by Mr. Justice Field; but notwithstanding this unbroken chain of authorities by the most eminent State courts of the Union and the firm judicial adherence by the court of appeals of Kentucky to the doctrine of the sanctity and inviolability of vested contract rights we are told that it has all been set aside, repudiated, and annulled by a dictum of Mr. Justice Waite in the case of Stone *vs.* Mississippi, reported in the 101 U. S., 814. The facts in that case are briefly these: The State of Mississippi, by an act approved February 16, 1867, incorporated the Mississippi Agricultural and Manufacturing Aid Society and conferred upon the said company or corporation the privilege of operating a lottery for the space of 25 years. On the 15th of May, 1868, the constitutional convention of that State adopted a new constitution, which was ratified by the people of Mississippi on December 1st, 1869.

By section 16 of the said constitution it was declared that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery hereto-
120 fore authorized be permitted to be drawn or tickets therein to be sold." The legislature of Mississippi, by an act approved July 16, 1870, passed an act entitled "An act enforcing the provisions of the constitution of the State of Mississippi prohibiting all kinds of lotteries within said State and making it unlawful to conduct one in this State." On the 17th of March, 1874, the attorney general of Mississippi filed an information in the Warren circuit court of that State in the nature of a *quo warranto vs.* John B. Stone and others, alleging that without authority or warrant of law they were then and for the preceding twelve months had been carrying on a lottery or gift enterprise within said county and State under the name of the Mississippi Agricultural, Educational and Manufacturing Aid Society. The information further charged that the said society had obtained its charter and right to operate the lottery privilege or gift enterprise from the legislature of the State, but set forth the constitutional provision above quoted and the act of the legislature thereunder of July 16, 1870, and averred that the charter was thereby virtually and in effect repealed. The defendants in their answer admitted that they were carrying on the lottery enterprise, but averred that in so doing they were only exercising the rights, privileges, and franchises conferred upon them by the act of February 16, 1867, and that they had in all things complied with

its provisions, and they claimed as a matter of law that their
121 rights and franchises were not impaired by the said constitutional provision and the legislative act thereunder on which the Commonwealth relied. The case was submitted, and the lower court held that the act conferring the lottery franchise upon the defendants, grantees or licensees of the State, was abrogated and annulled by the said provision of the constitution of 1868 and by the legislation thereunder of July 16, 1870, and gave judgment of ouster against the defendants. On appeal the judgment was affirmed by the supreme court of Mississippi, and from that judgment a writ of error was taken to the Supreme Court of the United States. These were the facts of the case presented for adjudication in that tribunal.

It will be seen that no contract had been made by the grantees of the lottery privilege with any third person touching the said franchise. No intervening contract rights by purchaser existed. There was no claim to the lottery privilege by any one except the original grantees themselves from the State. The franchise stood in the name of the original legislative grantees with the undoubted power in the legislative department of the State government of Mississippi to recall it at any time. No sale of the privilege had been made and no authority conferred by the State upon the grantees to make any sale or contract with reference thereto, and there *was* no rights of third parties intervening and no contract right claimed whatever to the said privilege other than that of a gratuitous donee holding
under the permission of the State. Why, it is more than
122 surprising that it should have ever been disputed for a moment by the legislative grantees in that case that they held only *durante bene placito* or that they should have challenged the right of the State to recall its bounty held by them, not under any contract, but merely as tenants at will or by sufferance. Mr. Chief Justice Waite decided, and could only decide, the question presented by the record for the court's decision, and that was whether or not, under the facts stated, the grantees had contract rights which were protected by section 10 of article 1 against impairment by the State of Mississippi. His opinion is a short one, of five pages in length.

There were no briefs filed in the case and it doesn't appear from the report that it was argued by counsel. Certain it is that the learned Chief Justice does not cite or refer to a single decision on the question of intervening contract rights of third parties. As the question was not presented it was proper that such cases should not be referred to. He begins his opinion, however, with the statement that "it is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause of the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts" (citing article 1, section 10, of the Federal Constitution). "The doctrines," says he, "of Trustees of Dartmouth College *vs.* Woodward, 4 Wheat., 518, announced by this court more

than sixty years ago, have become so imbedded in the juris-
123 prudence of the United States as to make them to all intents and purposes a part of the Constitution itself." In this connection, however, it is to be kept in mind that it is not the charter which it is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently the first inquiry in this class of cases always is whether a contract has in fact been entered into; and, if so, what its obligations are. In the present case the question is whether the State of Mississippi in its sovereign capacity did by the charter now under consideration bind itself irrevocably by a contract to permit the Mississippi Agricultural, Educational and Manufacturing Aid Society for twenty-five years "to receive subscriptions and sell and dispose of certificates of subscription, etc., by casting of lots or by lot, chance, or otherwise," which the court held to be to all intent and purposes a lottery. The learned judge held, in accord with all the decisions in the State courts of the Union where the question has been presented, that the grant by Mississippi to the society was not a contract between the State and that corporation; that was exactly the doctrine laid down by the court of appeals in Gregory *vs.* Shelby College, 2 Metcalf, to which we have referred. It is a doctrine that has never been disputed in Kentucky. It is a doctrine that was announced by Judge Simrall in Musgrove case in 44 Miss., above cited. It is the same doctrine announced by Judges Wagner and Norton in the Missouri
124 cases to which I have referred and by the supreme court of Connecticut in State *vs.* Phalan, *supra*. All the authorities hold that the legislature of a State cannot bargain away its police power to a grantee or licensee, but Judge Waite in Stone *vs.* Mississippi does not decide, because he was not called upon to decide, whether or not, if the State had authorized its grantee, the Mississippi Agricultural, Educational and Manufacturing Aid Society, to sell and convey to a purchaser for value the right to operate that lottery, and a purchaser, acting upon the faith of the authority conferred by the State upon its grantee to make the sale, had entered into a contract to purchase with said society and had bought the privilege, the State by a subsequent act of its legislature of constitutional convention could impair and annul the obligations of said contract by confiscating and destroying the subject-matter of the sale. "All agree," said he, "that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State. No legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." The learned judge further held, what no one can dispute, that lotteries are proper subjects for the exercise of the police power of a State. He quotes with approval the philippic of Mr. Justice Greer in Phalan *vs.* Virginia, 8 Howard, *supra*, against lotteries, but omits to refer to
125 his eulogy upon the commendable caution of the law-making power of Virginia, when repealing the Farquier lottery grant,

in providing for the protection of contract vested rights touching said lottery grants. I do not see that Stone *vs.* Mississippi, relied upon by the distinguished counsel for the Commonwealth, has any bearing or pertinency to the constitutional question raised by the demurrer in this case. There were no contract vested rights of property involved in Stone *vs.* Mississippi, and therefore the court, through its learned Chief Justice, has nothing to say upon this subject in the opinion in that case. Singularly enough, in the case of Houston *vs.* City of New Orleans, 119 U. S., 265, when the same learned Chief Justice was called on to decide whether or not the Louisiana State Lottery Company had a valid contract with the State of Louisiana in its sovereign capacity, by which the said State had bound itself irrevocably to allow that company to operate its lottery franchise in that State, held that the grant of a charter to the Louisiana State lottery by the sovereign State of Louisiana did bind the Commonwealth irrevocably in the first instance, because the grant was contained in the constitution of the State of Louisiana. He held that the grant of the charter in the constitutional provision conferring the lottery privilege upon the Louisiana State Lottery Company withdrew the lottery franchise from the scope of the police power of the State, to be exercised by the General Assembly, so far as that company was concerned.

126 The learned Chief Justice says no one will dispute that proposition. I shall not attempt to reconcile the two decisions nor comment upon the obvious omission of that distinguished jurist to recognize in the case of Houston *vs.* City of New Orleans the fact that the acts of a State through her legislature, when not in contravention of any provision of the State *of* Federal Constitution, i*n* as much an act of sovereignty until repealed as any declaration of a constitutional convention imbedded in the organic law of a State. A State legislates not by permission of constitutional grant; it is not a government of delegated powers as the Federal Government is, but it is a sovereignty bespeaking its sovereignty through its legislature and is only restrained and limited in its legislative jurisdiction by the limit — actions contained in the State and Federal Constitution.

I agree that it is not my province to discuss the irreconcilable contrariety apparent between these two decisions of the Supreme Court of the United States. It is necessary, however, and eminently proper for this court to demonstrate, as I think has been done conclusively, that Stone *vs.* Mississippi is an authority against the Commonwealth in this ac- rather than in favor. If the dictum of Chief Justice Waite in Stone *vs.* Mississippi can be considered as inconsistent with the unbroken current of decisions by our court of appeals on the issues of law under consideration (and I think it is not), it is important to observe that it was after the decision

127 of that case that our court of appeals considered and decided the cases of the Commonwealth *vs.* Douglas and against Frankfort and Webb above cited. If the doctrine of Stone *vs.* Mississippi is in conflict with the subsequent decisions of our court of appeals (and I cannot see that it is), I have no hesitation in saying

that this court has neither the inclination nor the right to turn its back upon the doctrine of the sanctity and inviolability of vested contract rights so ably and unswervingly vindicated by the court of appeals of Kentucky in order to follow the dictum of the learned Chief Justice of the Supreme Court of the United States in a case in which the question was not before the court for adjudication, particularly as the decision of our court of appeals holding that contract vested rights of the citizen is inviolable either by State statute or by State constitution is binding and final and under the 25th section of the judiciary act is not revisable by the Supreme Court of the United States.

The provision of our present State constitution, section 226, prohibiting the granting of lotteries in the future and revoking all lottery grants now extant in this State has a wide and useful field upon which its remedial energies may be expended. What is its effect? It forever prohibits the creation of any lottery privilege or franchise in this State and it revokes and annuls all lottery privileges and franchises already granted. It does not, however, annul
or undertake to annul the obligations of the contract between
128 E. S. Stewart and the city of Frankfort which the State, in its sovereign capacity by a special act authorized the city of Frankfort to make. What the convention which framed the constitution and the people who ratified and adopted it actually meant and intended to mean was to forever prohibit the creation or granting of any lottery privilege in this Commonwealth again and to repeal and extinguish all lottery grants and privileges in the hands of grantees of the State and otherwise where it would not impair the obligation of contracts or destroy vested contract rights. Surely the convention did not intend to attempt to do that which, if they were not profoundly ignorant of the law as repeatedly expounded by the supreme court of this State, they must have known they had no constitutional power to do—namely, to destroy contract rights and vested property rights growing out of contracts which the State of Kentucky had expressly authorized to be made.

Had no ordinance or provision been proposed in the constitutional convention by any member of that body to annul and set aside the contract between E. S. Stewart and the city of Frankfort by which, under express authority from the State, the said Stewart had bought from that city for a valuable consideration the lottery franchise conferred upon it by the act of 1869, there were statesmen and constitutional lawyers in that convention who walked the high rounds of the profession who would have said, "No; that cannot be done. We cannot divest the title and confiscate the property
rights of Stewart and his assignees held by them under a
129 contract which Kentucky authorized the city of Frankfort to make with them." They would have said: "In the hands of the grantees from the State we can annul the lottery franchise because it is a mere gratuity, license, or privilege which the State in her sovereignty can revoke, and we can prohibit through all time the granting of any other lottery franchise in this Commonwealth," and in lieu of the communistic provision or ordinance to invalidate

the contract between Stewart and the city of Frankfort and between the defendant Douglas and Annie B. Stewart, and to confiscate the vested rights of property acquired by E. S. Stewart and his assignees under his contract with the city of Frankfort, the lawyer and statesman would have offered section 226 of the present constitution just as it is written, which does not and in my judgment cannot affect the rights of the defendant in this action. This is the conclusion at which I am constrained to arrive after giving the subject my best though- and most earnest consideration. It is strictly a legal judgment which I am required to make; one in which no element of temporary excitement or public prejudice should enter. It is purely a judicial question of constitutional law submitted to a Kentucky court of justice for a decision, and he is worse than an enemy to the State who would have it otherwise decided than upon strictly legal grounds; and why should the decision of any court of justice be based upon any other ground?

Are the courts to bend to the winds of occasional doctrine,
130 to consult the weather-vane of popular sentiment? Is a judge who is sworn to decide the law without fear or favor to pander to public clamor or popular sentiment? Is the integrity of the administration of justice to be subordinated and debauched by public prejudice? Are the courts at the demand of a public sentiment, however virtuous and well meaning, to lend their aid to the breach of contracts fairly made and specifically authorized by the law-making power of a State and repeatedly sanctioned by the decisions of the supreme judicature of a State in order to appease and gratify the moral or political sentiment of the community? It is not improper nor out of place for me to suggest these inquiries, because since this case has been under consideration some newspapers have so far confounded the liberty of the press with its unbridled license as to speak in a tone approaching that of command and of menace concerning the decision to be expected from this court. Such a perverted sense of the duty of the press is greatly discreditable to the character of journalism, as well as disrespectful and injurious to the court. Such conduct is an outrage upon the administration of justice, and, it is believed, is offensive to that decent public sentiment which would be most pleased could this court see its way to render a judgment against the defendant. Such conduct, I cannot refrain from saying, is detrimental to the public weal, because there might be judges—it is believed there are none such in this State—
who could be reached and influenced by such disreputable
131 methods. It is no choice of mine, but an official duty, that I have to decide this case at all; but I do not shrink from the demands of that duty nor would I shirk the responsibility which it imposes. I adopt the language of Mr. Chief Justice Marshall on an occasion not dissimilar to this, when he knew his decision was in contravention of the wishes and sentiments of a large, respectable public element (I refer to the trial of Aaron Burr). "No man," said he, "is desirous of placing himself in a disagreeable situation; no man is desirous of becoming the peculiar subject of calumny; no man could he let the bitter cup pass from him without self-reproach

would drain it to the bottom, but if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprob-ium of those who are denominated the world, he merits the contempt, as well as the indignation, of his country. Who can hesitate which to embrace?"

The demurrer of the Commonwealth is overruled.

STERLING B. TONEY, *Judge.*

132 STATE OF KENTUCKY, }
Jefferson County. }

I, John S. Cain, clerk of the Jefferson circuit court and *ex officio* clerk of the Louisville law and equity court (common law), do hereby certify that the 130 pages attached hereto contain a true, correct, and complete copy and transcript of the record in the action mentioned therein, Commonwealth of Kentucky *vs.* Frankfort Lottery, &c., as appears of record in my office.

Given under my hand as said clerk this 13th day of July, 1892.

JNO. S. CAIN, *Clerk.*

133 Afterwards, at a court of appeals held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 5th day of September, 1892, the following order was made:

Order Motion to Advance.

(Louisville Law & Equity.)

COMMONWEALTH OF KENTUCKY }
vs. }
J. J. DOUGLAS. }

Came the attorney general and filed grounds and moved the court to advance this case and set it for an early day for hearing; which motion being heard, the court took time.

The following are the grounds filed by the foregoing order:

Grounds Filed.

Kentucky Court of Appeals.

COMMONWEALTH, Appellant, }
vs. } Motion.
DOUGLAS, Appellee. }

and

DOUGLAS, Appellant, }
vs. }
THE COMMONWEALTH, Appellee. }

In accordance with the provisions of the resolution of the General Assembly, directing the attorney general to institute *quo warranto*

proceedings against the lotteries, a copy of which is filed with this motion, I now move to advance these causes upon the docket with a view to a speedy hearing.

WM. J. HENDRICK,
Attorney General.

134 The following is the resolution referred to in the above grounds:

Resolution.

Resolution directing the attorney general to prosecute lottery companies.

Whereas, the General Assembly of the Commonwealth of Kentucky, by an act, entitled, "An act for the benefit of Henry Academy and Henry Female College," approved the ninth day of December, one thousand eight hundred and fifty, conferred upon the managers therein named lottery franchises; and whereas, the General Assembly of the Commonwealth of Kentucky, by an act, entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved the sixteenth day of March, one thousand eight hundred and sixty-nine, conferred lottery franchises upon the board of councilmen of said city, and by another act, entitled, "An act, amendatory of the laws in relation to the city of Frankfort," approved twenty-eighth day of March, one thousand eight hundred and seventy-two, the said board of councilmen was authorized to sell the lottery franchises therein conferred upon it; and whereas, the General Assembly at its last session repealed each of said acts, and other acts, which confer lottery franchises; and whereas, the constitution revokes all lottery charters and privileges heretofore granted; and whereas, it is believed, that section two hundred and twenty-six of the constitution, recently adopted, terminates and destroys all lottery charters and privileges heretofore granted by the General Assembly; therefore,

Resolved by the General Assembly of the Commonwealth
135 of Kentucky:

SEC. 1. That the attorney general be, *be* and he is hereby, directed and authorized to immediately institute and prosecute such legal proceedings as may be necessary to suppress or revoke all lotteries or lottery franchises, privileges or charters, operated in this Commonwealth. The reason for the emergency, which demands that this resolution take effect from its adoption, is, that lotteries are believed to be openly conducting their business, in defiance of the constitution and laws. Provided, that owing to an existing and clearly recognized emergency, the adjudication of any and all litigated causes growing out of acts of the General Assembly which look to the control, regulation or suppression of any or all lotteries heretofore doing, or proposing to do, business in the State of Kentucky, shall be so advanced on the dockets of the courts of this Commonwealth as to give those causes such precedence as will bring

speedy ending to all such suits, whether now before the courts or hereafter submitted for their determination.

SEC. 2. By reason of the emergency heretofore stated, and hereby declared to exist, this resolution shall take effect from its adoption.

W. M. MOORE,
Speaker House of Representatives.
D. H. SMITH,
President of the Senate pro Tem.

Approved Jan. 30, 1892.
JOHN YOUNG BROWN, *Gov.*

136 By the governor:
JOHN W. HEADLEY,
Secretary of State.

COMMONWEALTH OF KENTUCKY:

OFFICE OF SECRETARY OF STATE.

I, John W. Headley, secretary of state for the Commonwealth aforesaid, do hereby certify that the foregoing writing has been carefully compared by me with the original on file in this office, whereof it purports to be a copy, and that it is a true and exact copy of the same.

In testimony whereof I hereto sign my name and cause my official seal to be affixed.

Done at Frankfort this 9th day of January, A. D. 1893.

JOHN W. HEADLEY,
Secretary of State,
By EDW. O. LEIGH,
Assistant Secretary of State.

Afterwards, at a court of appeals held as aforesaid on the 8th day of September, 1892, the following order was entered herein:

Ord. Set for Oral Arg.

The court being advised, it is ordered that this case be set for oral argument on the 4th of October, 1892.

Afterwards, on September 13, 1892, at a court of appeals held as aforesaid, the following order was entered herein:

Order Submit Motion to Strike Case from Docket.

Came the appellee, by counsel, and filed grounds and
137 moved the court to strike this case from the docket, and the cause is submitted on said motion.

(The grounds referred to in said order are not found among the papers of this case.)

Afterwards, on September 27, 1892, the following order was entered herein:

Order Statement Filed.

The attorney general filed the following written motion herein, to wit, pending the motion of the appellee to strike this case from the docket a statement such as is directed by the 739th section of the Civil Code is herewith presented, and the appellant now moves the court, in case it should determine that a statement was necessary, that said statement be filed now for the time when it was due to be filed.

(The statement referred to in the foregoing motion cannot be found among the papers of this case.)

Afterwards, on September 29, 1892, the following order was entered herein:

Order Overrule Mo. to Strike Case from Docket & File Statement.

The court being sufficiently advised, it is considered that the motion to strike this case from the docket be overruled at the cost of appellant, and the statement heretofore tendered by the attorney general is ordered to be filed.

Afterwards, on the 4th day of October, 1892, the following
138 order was made herein:

Order Continue.

On motion of appellee, this cause is continued.

Afterwards, at court of appeals held as aforesaid on January 10, 1893, the following order was made herein:

Noting Argument.

This cause, coming on to be heard, was argued by D. W. Sanders for Douglas and Frank Parsons for the Commonwealth and laid over for further hearing on tomorrow.

Noting Argument & Submission.

Afterwards, on January 11, 1893, this cause, coming on to be heard, was argued by John G. Carlisle for Douglas and W. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid on December 16, 1893, the following orders and judgments were entered:

Judgment of Court of Appeals.

COMMONWEALTH OF KENTUCKY, Appellant, vs. J. J. DOUGLAS, Appellee. } Appeal from the Louisville Law & Equity Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for proceedings in conformity with the opinion herein.

It is further considered that appellant recover of appellee its cost expended herein.

139 On the same day, December 16, 1893, and the same time the following opinion was delivered herein:

Opinion of Ct. of Appeals.

Kentucky Court of Appeals, December 16, 1893.

COMMONWEALTH OF KY., Appellant, vs. J. J. DOUGLASS, Appellee, & J. J. DOUGLAS, Appellant, vs. COMMONWEALTH OF KY., Appellee. } Appeals from the Louisville Law & Equity Court.

Opinion of the court delivered by Chief Justice BENNETT:

These proceedings were commenced and prosecuted by the Commonwealth to prevent the usurpation of the franchise claimed by Douglass to operate said lotteries.

It seems that the legislature in 1850 authorized J. N. Webb to raise money by lottery for the benefit of the Henry Academy and Henry Female College. The 3rd section of the act empowered the grantees to sell the scheme, which they did, and which fell into the hands, by purchase, of the appellant Douglass, who proceeded to operate the same under said grant. He claims that the legislature having authorized the sale of the franchise, and he having become the purchaser thereof, his right to it became a vested right, which the legislature could not thereafter take away, because it would be impairment of the obligation of contracts which article 1, section 10, of the Constitution of the United States expressly forbids.

140 The lower court, upon the hearing of the case, decided that the grant had expired by limitation, and that decision must stand and is affirmed.

In 1838 the legislature granted the privilege to certain gentlemen

to raise money by lottery for the benefit of the city schools of Frankfort, and in 1872 the said act was amended so as to allow the board of councilmen of the city of Frankfort to sell and convey the privileges granted for the purpose mentioned, and the appellee in 1875 purchased all the lottery franchises and privileges conferred by the act of 1838 and also the amendatory act of 1869.

The appellee Douglass contends that he was the purchaser of said franchise, and claims that by reason of the act authorizing the sale of said lottery and the purchase thereof he acquired a vested right which the legislature could not take away by its act of 1890 repealing said franchise, and relies upon article 1, section 10, of the Federal Constitution, which prohibits the States from passing any laws impairing the obligation of contracts as sustaining his contention and the decisions of this court thus construing his purchase.

This court in the case Gregory *vs.* The Trustees of the Shelby College Lottery, 2 Met., 598, decided that a lottery grant might be repealed by a subsequent legislature, unless rights had been acquired and liabilities incurred upon the faith of the privileges conferred by the grant; in which case the rights thus acquired and liabilities incurred became contractual, which the provision *supra* protected from repeal by subsequent legislation. The appellant contends that the grant of the lottery privilege by the State was
141 an exercise of its police, not its contractual power, which is inherently lodged in the State for the promotion and protection of its welfare and happiness, which the State cannot surrender and barter away either as a gratuity or for pay; that while the legislature may, in the exercise of its police power, grant a lottery privilege, the grant is only a privilege or license, not contractual, and a subsequent legislature in the interest of good order and morals may revoke the privilege thus granted and repeal the grant, although pecuniary interests have been acquired under and by authority of the grant.

It seems that this court in the Gregory case, *supra*, decided expressly that when rights had been acquired and liabilities incurred upon the faith of the lottery grant, such rights and liabilities should be regarded as contracts which are protected by the Federal Constitution against impairment by the State legislature, and which should be upheld to the extent, at least, that the party has the right to enjoy the right thus acquired until he realizes his money thus invested out of the lottery business. The famous Dartmouth College case, and others that have followed it, is invoked to sustain this position. The other cases upon the same subject, subsequently rendered by this court, repeat the same doctrine. But the Supreme Court of the United States in Stone *vs.* Mississippi, 101 Supreme Court Reports, 814, in construing the provision of the Federal Constitution that declares that the States shall pass no law impairing the obligation of contracts, held
142 that the inhibition related to "property rights" and not to matters that were "governmental." The court then held in strong and emphatic language that lotteries, being a species of gambling, were vicious and demoralizing in the

community, and that, as it was the trust duty of the State government to protect and promote the public health and morals, it could not sell, barter, or give away that duty, and that the utmost power the legislature could exercise was to grant a license to carry on that species of gambling, which only protected the licensee from the pains and penalties imposed upon that species of gambling during the existence of the license, and that the legislature granting the license had no power to bind a subsequent legislature to its line of policy upon these subjects, and that a subsequent legislature might repeal the grant of the license, although it had been paid for.

It seems to us that this decision defining the provision of the Federal Constitution as to what subjects are contracts and protected by it, and that lottery grants, though paid for, are not protected by said provision, is binding upon this court, and has the effect to overrule its decisions holding the contrary view.

But, apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between the contractual and governmental power of the States, to wit, that the provisions of the Federal Constitution in reference to contracts only inhibits the States from passing laws impairing the obligation of such contracts as relate to property rights, but not
143 to subjects that are purely governmental.

The reason for this distinction must be apparent to all, for when we consider that Honesty, morality, religion, and education are the main pillars of the State, and for the protection and promotion of which government was instituted among men, it at once strikes the mind that the government, through its agents, cannot throw off these trust duties by selling, bartering, or giving them away. The preservation of the trust is essential to the happiness and welfare of the beneficiaries, which the trustees have no power to sell or give away.

If it be conceded that the State can give, sell, and barter any one of them, it follows that it can thus surrender its control of all, and convert the State into dens of bawdy-houses, gambling shops, and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals, and good order of the State would be cast to the winds, and vice and crime would triumph in their stead.

Now, it seems to us that the essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government.
144 The power of the State to grant a license to carry on any species of gambling or with the privilege of revoking the same at any time has an unwholesome effect upon the community and tends to make honest men revolt at the injustice of punishing others for engaging in like vices. We have, for instance, at this day men confined in the State penitentiary for setting up and carrying on gambling shops whose tendencies are not much

more demoralizing, if any, than the licensed lottery operator, wh
goes free under the protection of the law. The one wears a felon
garb and the other is protected by license which he claims as a
irrevocable contract because he has paid for the privilege. Th
privilege ought never to be granted, and under the present const
tution can never be. As said, to impress the privilege with the ide
of contract because it was paid for might fill the whole State, an
especially the cities, with gambling shops and enterprises protecte
by contract, and the few gamblers that might not be thus protecte
and who would be liable to be punished for gambling would not b
because it would strike honest men as unjust to punish the poo
wretch for doing that which was made lawful for others to do b
paying for the privilege. As said, we are bound by the construc
tion given to the provision of the Federal Constitution by the Su
preme Court, relating to the impairment of contracts by the States
to the effect that the provision does not relate to lottery franchises
though paid for, and that, the matter of such grants being strictly
within the police power of the State, the State could not sell or barte
away its control of the subject.

145 It is contended that the subject of the appellee's contract
right is *res adjudicata* by this court.

It is sufficient to say that the State had no constitutional right
to contract its police power away, consequently the appellee made
his purchase of the franchise subject to the right of the State to re-
peal it; and the decision of this court that the appellee's purchase
of the franchise by the authority of the legislature created a contract
that could not under the Federal Constitution be revoked, having
been virtually overruled by the Supreme Court of the United States,
destroys the contention of *res adjudicata;* and while the judge of the
court below was loyal to this court in following the opinions here-
tofore rendered, we must affirm the judgment in the Henry county
lottery case and reverse his judgment as to the Frankfort lottery,
and remand the case for further proceedings in conformity with this
opinion.

Afterwards, on the 29th day of December, 1893, the appellee and
plaintiff in error filed in the office of the clerk of the Kentucky
court of appeals his application for writ of error and his assignment
of errors as follows:

Application for Writ of Error & Assignment of Errors.

COMMONWEALTH OF KENTUCKY:

Court of Appeals.

On application for writ of error, with supersedeas, to the Supreme Court of the United States.

146 J. J. DOUGLAS, Plaintiff in Error, *vs.* COMMONWEALTH OF KENTUCKY, Defendant in Error. } Petition for Writ of Error and Assignment of Errors.

The plaintiff in error in the above-styled cause complains of the judgment of the court of appeals of Kentucky, entered on the 16th day of December, 1893, reversing the judgment of the Louisville law and equity court, and respectfully prays a writ of error, with supersedeas, from the said judgment to the Supreme Court of the United States, and represents that the said court of appeals erred to the prejudice of said plaintiff in error, and he files the following assignment of errors, to wit:

1. The said court of appeals of Kentucky erred to the prejudice of the plaintiff in error in adjudging and directing that the judgment rendered by the Louisville law and equity court in favor of the plaintiff in error against the defendant in error should be reversed, and in adjudging against the plaintiff in error and in favor of the defendant in error the costs in the said case expended. The said erroneous and prejudicial judgment of the said court of appeals of Kentucky was rendered on the 16th day of December, 1893, and the said judgment is erroneous in that it deprives the plaintiff in error of the benefits of the contract made between him and his vendors and the city of Frankfort and the Commonwealth of
147 Kentucky as embraced and evidenced by the acts of the legislature of Kentucky specifically mentioned in the transcript in this case and the contracts entered into by virtue thereof between the city of Frankfort and the plaintiff in error and his vendors, which are specifically mentioned and set forth in the said transcript.

2. It was error prejudicial to the plaintiff in error and in violation of the rights secured and guaranteed to him by section 10 of article 1 of the Constitution of the United States for the said court of appeals of Kentucky, after the passage, approval, and acceptance by the said city of Frankfort of the franchise created and conferred on the said city of Frankfort by the said acts of the General Assembly of the Commonwealth of Kentucky and the contracts duly executed by the said city of Frankfort in accordance with the provisions of the said acts of the said General Assembly therein conveying to this plaintiff in error, through his vendors, the said franchise created and conferred on said city

of Frankfort by the said acts of the General Assembly o the Commonwealth of Kentucky enacted as aforesaid, and afte the same had been adjudged and decreed by the said court of ap peals to be valid and this plaintiff in error had acted on the faith thereof and incurred large obligations and expended and is stil liable for large obligations, to adjudge that it was within the powe of the Commonwealth of Kentucky, through her legislature o General Assembly, to repeal the said enactments and divest th appellant in error of the benefits of his contracts acquired by hin thereunder as set forth in the transcript in this case; and i
148 was especially erroneous and prejudicial to the plaintiff i error for the said court of appeals of Kentucky to adjudg and declare that the act of the said General Assembly of the Com monwealth of Kentucky approved March 22nd, 1890, was valid an not in violation of section 10 of article 1 of the Constitution of th United States and operated to deprive the plaintiff in error of th contract rights acquired by and adjudged to him as aforesaid.

3. It was also error and prejudicial to the plaintiff in error *tha* the said court of appeals of Kentucky (as they have done in th judgment complained of herein) to adjudge and declare in effec that section 236 of the present constitution of Kentucky, whic was adopted and went into effect in the month of September, 1891 operated to divest the plaintiff in error of his contract rights ac quired by him as set forth in the transcript of the record in thi case, and in further adjudging and declaring that the said legisla tive and constitutional provisions were not in conflict with sec tion 10 of article 1 of the Constitution of the United States.

4. It was error prejudicial to the plaintiff in error for the sai court of appeals of Kentucky, after having fully decided that th legislative enactments and the contracts made and executed in pur suance thereto were valid and not subject to alteration, amendment or repeal by the General Assembly of the Commonwealth of Ken tucky, as was done in the case of The Commonwealth of Kentucky *vs.* The City of Frankfort *et al.*, rendered on the 27th day of Feb ruary, 1878, and in other cases, which were in full force an
149 effect at the time the plaintiff in error made the contract i controversy and assumed the obligations therein mentioned and on the faith of which he acted in incurring the said obliga tions, now to reconsider the said decision and to divest the plaintif in error of his contract rights acquired thereunder without firs making due compensation therefor.

Wherefore the plaintiff in error, the said J. J. Douglas, prays tha he be allowed a writ of error, with supersedeas, to the Suprem Court of the United States, to the end that the said judgment o said court of appeals of Kentucky may be inquired into, reviewed and corrected, with such directions from the said Supreme Court o the United States to the said court of appeals of Kentucky as to i may seem proper, and, finally, that the said judgment of the cour of appeals of Kentucky rendered on the 16th day of December 1893, may be reversed, with directions to said court to affirm th

judgment of the Louisville law and equity court therein mentioned.

J. G. CARLISLE,
D. W. SANDERS,
Attorneys for Plaintiff in Error.

On the same day, December 29, 1893, the plaintiff in error filed in said clerk's office a copy of the following writ of error:

150 *Writ of Error.*

UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in said court of appeals, before you, being the highest court of law or equity of the said State of Kentucky in which decision could be had in the said suit between The Commonwealth of Kentucky, appellant, and J. J. Douglas, appellee, wherein was drawn in question the validity of certain statutes of the State of Kentucky enacted by the legislature thereof on March 22nd, 1890, entitled "An act to repeal so much of section eighteen of an act entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' approved March sixteenth, one thousand eight hundred and sixty-nine, as grants to the board of councilmen of the city of Frankfort the same power and authority granted to the managers in an act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved February first, one thousand eight hundred and thirty-eight, and to repeal all amendatory acts in
151 relation to said grant," and section 236 of the constitution of Kentucky of 1891, on the ground that the said constitutional provision and the said act of March 22nd, 1890, being repugnant to section 10, article 1, of the Constitution of the United States, and the decision was in favor of the validity of the said statute of March 22nd, 1890, and of said constitutional provision, a manifest error hath happened, to the great damage of the said J. J. Douglas, the plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington not exceeding thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct

that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 28th day of
152 December, one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

[Seal 6th Circuit Court, Ky. Dist., U. S. of America.]

THOS. SPEED,
Clerk of the Circuit Court of the United States for the District of Kentucky.

Examined and allowed by—
C. BENNETT,
Chief Justice of the Court of Appeals of Kentucky.

153 At the same time the plaintiff in error filed in said clerk's office a supersedeas bond, which is in words and figures following, to wit:

Supersedeas Bond.

COMMONWEALTH OF KENTUCKY:

Court of Appeals.

Supersedeas bond on writ of error in the court of appeals of Kentucky to the Supreme Court of the United States.

J. J. DOUGLAS, Plaintiff in Error,
vs.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

Know all men by these presents that we, J. J. Douglas, as principal, and Jacob Hoertz, as surety, both of the city of Louisville, Jefferson county, State of Kentucky, are held and firmly bound unto the above-named Commonwealth of Kentucky, defendant in error, in the sum of five thousand dollars, to be paid to said Commonwealth of Kentucky; for the payment of which, well and truly to be made, we bind ourselves and each of us and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of December, in the year of our Lord 1893.

Whereas the above-named J. J. Douglas has sued out a writ of error from the court of appeals of Kentucky to the Supreme
154 Court of the United States to reverse the judgment and decree rendered in the above-entitled suit before the said court of appeals of Kentucky on the 16th day of December, 1893:

Now, therefore, the condition of this obligation is such that if the above-named J. J. Douglas shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make said writ

of error good, then this obligation shall be void; otherwise the same shall remain in full force and effect.

J. J. DOUGLAS. [SEAL.]
JACOB HOERTZ. [SEAL.]

Sealed and delivered and taken and acknowledged before me and approved by me this the 28th day of December, 1893.

Examined and approved this the 28th day of December, 1893.

C. BENNETT,
Chief Justice Court of Appeals of Kentucky.

155 COMMONWEALTH OF KENTUCKY:

I, Abram Addams, clerk of the Kentucky court of appeals, certify that the preceding 154 pages contain a true and complete transcript of the record and of the proceedings had in said court in the case of The Commonwealth of Kentucky, appellant, against J. J. Douglas, appellee, upon an appeal from a judgment of the Louisville law & equity court, as the same appears on file and of record in my office, together with the writ of error, a copy of which is on file in my office, and also copies of the application for the said writ, the assignment of errors, and the supersedeas bond, the originals of which are on file in my office.

Seal Kentucky Court of Appeals.

In witness whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 3d day of January, A. D. 1894.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $49.00.

156 COMMONWEALTH OF KENTUCKY:

Court of Appeals.

UNITED STATES OF AMERICA, *District of Kentucky*, } ss:

To the Commonwealth of Kentucky, acting through John Young Brown, its governor: W. J. Hendrick, its attorney general, and Frank Parsons, the Commonwealth's attorney for the thirtieth judicial district, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington, in the District of Columbia, not exceeding thirty days from this date, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein J. J. Douglas is plaintiff in error and you are defendant in error, to show cause, if any shall be, why the judgment in said writ of error mentioned should

not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Caswell Bennett, chief justice of the court of appeals of Kentucky, this the 28th day of December, in the year of our Lord 1893.

C. BENNETT,
Chief Justice Court of Appeals of Kentucky.

157 Executed the within by delivering one copy thereof to John Young Brown, governor of Kentucky, and one copy hereof to W. J. Hendricks, attorney general of Kentucky, on the 6th day of January, 1894, and one copy thereof to Frank Parsons, the Commonwealth's attorney for the thirtieth (30th) judicial district of Kentucky, on the 9th day of January, 1894.

JAMES BLACKBURN,
U. S. Marshal, District of Kentucky.

Mar. fees, 9.90.

Endorsed on cover: Case No. 15,490. Kentucky court of appeals. Term No., 319. J. J. Douglas, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed January 25, 1894.

No. 10.

Brf. of Carlisle & Sanders for P. E.

Supreme Court of the United States.

October Term, 1897.

Filed Sept. 16, 1897.

No. 10.

J. J. DOUGLAS,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

Brief for Plaintiff in Error on the Merits and on Motion to Dismiss for Want of Jurisdiction, and to Affirm as a Delay Case.

J. G. CARLISLE,
D. W. SANDERS,
AARON KOHN,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 10.

J. J. DOUGLAS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR ON THE MERITS AND ON MOTION TO DISMISS FOR WANT OF JURISDICTION, AND TO AFFIRM AS A DELAY CASE.

STATEMENT.

The defendant in error, by the attorney general, instituted this action in the Louisville law and equity court against J. J. Douglas and others under sections 480 to 487, inclusive, of the Civil Code of Kentucky, to prevent the usurpation of a franchise alleged to be exercised by plaintiff in error; to which petition Douglas filed an answer, consisting of three paragraphs.

A demurrer was filed to this answer, which the court overruled, and, the defendant in error declining to plead further, the petition was dismissed; from which judgment an appeal was prosecuted to the court of appeals of Kentucky. (See opinion of law and equity court, Record, pp. 28–65.)

On the 16th of December, 1893, the court of appeals delivered an opinion in which it was held that the contracts between the city of Frankfort and E. S. Stewart and between Stewart's executrix and Douglas were not protected against impairment by the Constitution of the United States, and the case was remanded "for further proceedings in conformity with this opinion" (Record, pp. 69–72). The case is brought here by writ of error, with supersedeas, and the following assignment of errors:

"1. The said court of appeals of Kentucky erred to the prejudice of the plaintiff in error in adjudging and directing that the judgment rendered by the Louisville law and equity court in favor of the plaintiff in error against the defendant in error should be reversed, and in adjudging against the plaintiff in error and in favor of the defendant in error the costs in the said case expended. The said erroneous and prejudicial judgment of the said court of appeals of Kentucky was rendered on the 16th day of December, 1893, and the said judgment is erroneous in that it deprives the plaintiff in error of the benefit of the contract made between him and his vendors and the city of Frankfort and the Commonwealth of Kentucky as embraced and evidenced by the acts of the legislature of Kentucky specifically mentioned in the transcript in this case and the contracts entered into by virtue thereof between the city of Frankfort and the plaintiff in error and his vendors, which are specifically mentioned and set forth in the said transcript.

"2. It was error prejudicial to the plaintiff in error and in violation of the rights secured and guaranteed to him by

section 10 of article 1 of the Constitution of the United States for the said court of appeals of Kentucky, after the passage, approval, and acceptance by the said city of Frankfort of the franchise created and conferred on the said city of Frankfort by the said acts of the General Assembly of the Commonwealth of Kentucky and the contracts duly executed by the said city of Frankfort in accordance with the provisions of the said acts of the said General Assembly therein conveying to this plaintiff in error, through his vendors, the said franchise created and conferred on said city of Frankfort by the said acts of the General Assembly of the Commonwealth of Kentucky enacted as aforesaid, and after the same had been adjudged and decreed by the said court of appeals to be valid and this plaintiff in error had acted on the faith thereof and incurred large obligations and expended and is still liable for large obligations, to adjudge that it was within the power of the Commonwealth of Kentucky, through her legislature or General Assembly, to repeal the said enactments and divest the plaintiff in error of the benefits of his contracts acquired by him thereunder, as set forth in the transcript in this case; and it was especially erroneous and prejudicial to the plaintiff in error for the said court of appeals of Kentucky to adjudge and declare that the act of the said General Assembly of the Commonwealth of Kentucky approved March 22d, 1890, was valid and not in violation of section 10 of article 1 of the Constitution of the United States and operated to deprive the plaintiff in error of the contract rights acquired by and adjudged to him as aforesaid.

"3. It was also error and prejudicial to the plaintiff in error for the said court of appeals of Kentucky (as they have done in the judgment complained of herein) to adjudge and declare in effect that section 236 of the present constitution of Kentucky, which was adopted and went into effect in the month of September, 1891, operated to divest the plaintiff in error of his contract rights acquired by him, as set forth in

the transcript of the record in this case, and in further adjudging and declaring that the said legislative and constitutional provisions were not in conflict with section 10 of article 1 of the Constitution of the United States.

"4. It was error prejudicial to the plaintiff in error for the said court of appeals of Kentucky, after having fully decided that the legislative enactments and the contracts made and executed in pursuance thereto were valid and not subject to alteration, amendment, or repeal by the General Assembly of the Commonwealth of Kentucky, as was done in the case of The Commonwealth of Kentucky *vs.* The City of Frankfort *et al.*, rendered on the 27th day of February, 1878, and in other cases, which were in full force and effect at the time the plaintiff in error made the contract in controversy and assumed the obligations therein mentioned, and on the faith of which he acted in incurring the said obligations, now to reconsider the said decision and to divest the plaintiff in error of his contract rights acquired thereunder without first making due compensation therefor."

In the petition it is alleged (Record, pp. 1–3):

"That by virtue of an act of the General Assembly entitled 'An act to amend and reduce into one the several acts in relation to the city of Frankfort,' approved March 16, 1869, it was provided 'that the board of councilmen of said city shall have the same franchises, power and authority as are conferred upon the managers in an act entitled "An act for the benefit of the city schools of the town of Frankfort," and for other purposes, approved February 1, 1838.' Under this act the board of councilmen were authorized to raise in one or more classes, as to them seemed expedient, any sum not exceeding one hundred thousand dollars, the money realized to be invested in safe and solvent securities, and the annual interests or profits to be appropriated for the city schools of Frankfort."

That by an act approved March 28, 1872, entitled "An act amendatory of the laws in relation to the city of Frankfort" it was provided that—

"The board of councilmen of the city of Frankfort be, and they are hereby, authorized and empowered to grant, bargain, sell and convey, to rent or lease any and all property or any part thereof, belonging to the said city of Frankfort, be the same lands, tenements, goods, chattels or franchises or immunities, on such terms, and for such sums, and at such times as said board of councilmen shall deem for the best interest of the city of Frankfort."

It was further alleged—

"That by virtue of the authority thus conferred, the board of councilmen of Frankfort, on or before December 31, 1875, disposed of all lottery franchises and privileges conferred by the act of 1869; that the defendant is maintaining, operating and conducting said lottery under said charter and franchise, and claiming the right so to do, under and by authority thereof."

The petition further alleged—

"That on March 22, 1890, by the terms of an act entitled 'An act to repeal so much of section 18 of the act entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," approved March 16, 1869,' as granted to the board of councilmen of the city of Frankfort the same power and authority as granted to the managers in an act entitled 'An act for the benefit of the city schools of the town of Frankfort, and for other purposes,' approved February 1, 1838, and to repeal the amendatory acts in relation to the said grants, the General Assembly of the Commonwealth of Kentucky repealed the charter of the Frankfort lottery," etc.

And that—

"By section 226 of the constitution of Kentucky it is provided that 'Lottery and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and no scheme for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked.'"

It was further alleged that the defendants were exercising the privileges and franchises granted by the charter, as aforesaid, and usurping the franchise to operate a lottery under said charter, and judgment of ouster was asked.

The answer of Douglas contains three paragraphs (Record, pp. 4–12).

In the first he simply denied that he had usurped the right, privilege, or franchise to operate a lottery.

In the second he pleaded various acts of the legislature beginning with the act approved February 1, 1838, creating the Frankfort lottery for the benefit of the city schools of the town of Frankfort and for the construction of such reservoirs, pipes, and other works as might be necessary to convey water from Cove Spring to the town of Frankfort, down to and including the act approved March 16, 1869, and the act of March 28, 1872, as set forth in the petition of the defendant in error; that E. S. Stewart, deceased, had entered into a contract with the mayor and board of councilmen of the city of Frankfort on the 31st day of December, 1875, under the authority conferred by the act of March 28, 1872, by which, for a valuable consideration, the mayor and board of councilmen of the city of Frankfort sold, conveyed, and assigned to the said Stewart the said lottery franchise and scheme conferred upon the said city by the act of March 16,

1869; that upon the death of said E. S. Stewart plaintiff in error purchased from his executrix and sole devisee the said franchise, scheme, and contract procured by the said Stewart under the contract of December 31, 1875, and had acquired the right to use the said franchise in accordance with the terms of the contract; that Stewart had executed bond to the city of Frankfort, as required by the acts set forth in the answer, which bond had been accepted, and that the purchases and contracts alleged had been entered into and performed prior to the passage of the act of the General Assembly of the 22d day of March, 1890, and prior to the adoption of the provisions in section 226 of the new constitution, relied upon in the petition of the Commonwealth. The plaintiff in error alleged that, by virtue of the said prior acts of the legislature and by the said contracts, with the terms of which he had fully complied, he became invested with the right to conduct and operate the franchise and to have the earnings thereof, which was a property right under his contract and could not be impaired or destroyed by the said act or constitutional ordinance relied upon in the petition.

The third paragraph pleads *res adjudicata* and *stare decisis*.

The claim of defendant in error, as shown by the petition, is based solely upon the act of 1890, repealing the charter of the Frankfort Lottery Company, and on section 226 of the new constitution. No other ground of action is stated.

The plaintiff in error insisted:

First. That the act of 1890 and the constitutional provision relied upon by the defendant in error do not undertake to repeal his contract rights.

Second. That the contract entered into under the authority of the General Assembly between E. S. Stewart, deceased, and the city of Frankfort was a valid and binding contract.

Third. That the contract of plaintiff in error with the executrix of E. S. Stewart, deceased, was valid and binding under the laws in force at the time it was made, and vested in him a right of property in the lottery franchise before the passage of the repealing act and constitutional ordinance relied upon by the defendant in error, and that he had a lawful right to use the same.

Fourth. That such rights were rights of property, acquired under a contract, based on a valuable consideration, and cannot be divested by subsequent legislation or constitutional revocation, and that the act of 1890 and the constitutional provision were inoperative as to his rights, because they sought, in violation of the constitution of Kentucky and the Constitution of the United States, to impair the obligations of a contract previously made.

Fifth. That the court of appeals of Kentucky in the case of *The Commonwealth against The City of Frankfort*, relative to the identical grant and franchise involved in this action, adjudged that the act of 1869 did confer upon the city of Frankfort a lottery franchise; that the act of March, 1872, did authorize a sale and conveyance of said franchise by the city of Frankfort, and that the conveyance to E. S. Stewart was valid and binding, and that said judgment is final and conclusive upon all said questions; and that the numerous decisions of said court of appeals upon the construction and effect of the various statutes alleged in the answer and of various repealing statutes settled, as a rule

of property in Kentucky, that a lottery franchise was the subject of contract, and that when a sale of such a franchise was made and perfected, under legislative authority, it invested the purchaser with a right of property in the franchise not subject to repeal or impairment by subsequent legislation; that the lottery franchise involved in this action was purchased by the plaintiff in error upon the faith of the decisions of that court rendered prior to such purchase, and the concurrent acts and construction of every department of the State government in accordance therewith, and that such construction must be adhered to in that State.

Defendant in error, however, insisted:

First. That the rights of plaintiff in error were not vested under a contract protected by the constitution of the State of Kentucky and of the United States, but were subject to repeal at the will of the legislature or constitutional convention.

Second. That the former decisions of the court of appeals were not conclusive upon the questions presented.

The State having, as shown by the preamble to the act, used the school fund of the city of Frankfort, and desiring to reimburse the city to some extent, the General Assembly of Kentucky, on the 1st day of February, 1838, passed an act entitled "An act for the benefit of the city schools of the town of Frankfort, and for other purposes," granting to certain persons named in the act the right to raise, by way of lottery, the sum of $100,000 to be appropriated, one-half for the benefit of the city schools and the other half for the con-

struction of reservoirs, pipes, and other works that might be necessary to convey water from Cove Spring to the city. By the fourth section of the act the managers were authorized to sell and dispose of the scheme or of any class or classes of said lottery upon the execution by the purchaser of a bond to the Commonwealth, conditioned faithfully to perform all the terms and provisions of the act; which bond was to be filed in the Franklin county court and approved by the court. Various intermediate acts were passed (all of which are fully set forth in the answer) prior to 1869.

By the act approved March 16, 1869, entitled "An act to amend and reduce into one the several acts in relation to the city of Frankfort," it was provided that the city of Frankfort and its affairs should be conducted by a board of councilmen to be elected and qualified under the provisions of said act; and by section 18 it was provided "that the said board of councilmen shall exercise and possess all the powers and privileges which, by the general laws of the land in relation to towns and cities, are granted to said trustees and councilmen. Said board of councilmen shall have *the same franchises*, power, and authority as are conferred on the managers in an act entitled 'An act for the benefit of the city schools of Frankfort, and for other purposes,' approved February 1, 1838, and shall invest all the moneys realized thereunder in safe and solvent securities, and may use and appropriate the interests and profits of such investment for the support of said schools."

By an act approved March 28, 1872, entitled "An act amendatory to the laws of the city of Frankfort" (which is set forth in the petition herein), the board of councilmen were authorized to sell, convey, rent, and lease all property

belonging to the city of Frankfort, including lands, tenements, goods, chattels, franchises, or immunities, "on such terms and for such sums as said board of councilmen should deem best for the interests of the city of Frankfort."

These were the laws of the State relating to the Frankfort lottery grant when, on the 31st day of December, 1875, E. S. Stewart entered into a contract with the mayor and board of councilmen of the city by which it was agreed between the parties that, whereas under the said acts of the General Assembly of Kentucky the city of Frankfort had the power to raise, by the sale of a lottery franchise, the sum of $100,000, upon such terms and in such manner as the city of Frankfort might deem proper, the said city had devised and published a scheme, with sundry classes, and did, in consideration of the agreement upon the part of E. S. Stewart to enter into a bond, with good security, to the Commonwealth of Kentucky, with condition well and faithfully to comply with all the terms and provisions of said acts and to pay all prizes drawn by any person or persons from time to time in any of the classes aforesaid, according to the provisions of said acts, and that said bond should be received by the city of Frankfort and approved by the county court of Franklin county—sell, convey, and assign unto the said E. S. Stewart the scheme devised by the said city of Frankfort under the said acts. In consideration of which sale, assignment, and transfer Stewart agreed and promised to pay to the said city various sums of money at various times, as set forth in the contract.

These matters are all set up in the answer, and the contract in writing, signed by the parties, duly approved, ratified, and confirmed by the general council of the city of Frank-

fort, is filed with the answer. Bond was executed by the said Stewart to the Commonwealth of Kentucky in the penal sum of $100,000, in accordance with the acts of the General Assembly. The bond was received and held sufficient by the general council of the city, was filed in the Franklin county court, approved and held sufficient by the said court, and ordered to be recorded in the clerk's office, which was done. Under this contract Stewart became the owner of the franchise in controversy in this case.

From the existence of the State government down to the adoption of the constitution of 1891, lottery charters and lottery grants in almost every conceivable form were granted by the General Assembly and upheld by the courts. The public policy of a State is conclusively shown by its legislation and by the action of its executive and judicial authorities. The public policy of Kentucky at the time of the making of the contract between Stewart and the city of Frankfort, as indicated by the legislation of the State and by the course of the executive officers, and the decisions of the courts, for nearly a century, not only tolerated, but maintained, the operation of lotteries. It has been truly said, that more lottery grants exist upon the statute books of Kentucky than there are charters for banks, insurance companies, or railroads. Grants were conferred from time to time by the State legislature, for wise and benevolent purposes, upon the best citizens of the State—men whose names are illustrious in the annals of the State and Federal governments. Grants were frequently made to individuals for personal pecuniary gain, but mostly to private corporations and municipalities for public purposes, such as the improvement of rivers, the erection and support of churches, the maintenance of eleemosynary insti-

tutions, for the benefit of schools, and for other like purposes. Such privileges were continuously granted, acted upon, and upheld in the State until the adoption of the new constitution in 1891. The operation of lotteries and the granting of lottery privileges were questions of public policy with which the State was entirely competent to deal, and with which it did deal on numerous occasions, as stated. Such being the policy of the State at the time Stewart made the contract with the city of Frankfort, the court of appeals of Kentucky having held continuously from 1859, when the question first arose, that contracts for the sale of lottery grants were protected against impairment by the constitution of the State and the Constitution of the United States, he had a right to rely, and did rely, upon the well-settled principle of law that all contracts are expounded and their construction, interpretation, and validity tested and determined by the existing law of the place where made. He, therefore, made the purchase in good faith and complied with all the requirements of the law, and he and his vendees have at all times fully complied with all the terms and conditions of the contract. It is not claimed that they have violated the law or the contract in any particular, but it is contended that although the contract was lawful when made and was still in force, it was destroyed by a legislative act and a constitutional provision.

After Stewart's contract was executed, the General Assembly of Kentucky, by joint resolution adopted March 7, 1876, instructed the attorney general of Kentucky to proceed by *quo warranto* against all persons and corporations claiming the right to operate lotteries under the various acts of the General Assembly of Kentucky. In obedience to this instruction, the attorney general began an action on be-

half of the Commonwealth against the Frankfort Lottery Company, under the act of 1838, and against the Stewart contract of December 31, 1875, based upon the acts of 1869 and 1872, *supra*, as well as actions against the Paducah, Shelby, and Henry lotteries.

The Revised Statutes of Kentucky adopted in 1852, provided that, "three years after the adoption of this revision all lottery franchises and privileges shall cease and determine." In 1878, a general act was passed, repealing all lottery privileges and charters and grants in the State of Kentucky. (See act approved March 30, 1878, General Statutes of Kentucky, p. 912.)

As stated, the attorney general instituted an action in the nature of a *quo warranto* against the city of Frankfort, E. S. Stewart, and others to oust them from the exercise of the franchise in controversy. This action was tried in the State circuit court, and a judgment rendered against the State, from which an appeal was taken to the court of appeals. The judgment of the court below was affirmed by the court of appeals on the 28th of February, 1878.

The decisions of the court of appeals of Kentucky in the case of *Webb vs. Commonwealth* and *Commonwealth vs. Douglas*, also, had been delivered when, E. S. Stewart having died, the plaintiff in error, as he shows in his answer, contracted for the scheme and became invested with the right to conduct, manage, and operate said lottery for a valuable consideration; and he further alleges in the answer that he paid large sums of money for the scheme and contract, and that he has made contracts and incurred liabilities involving large sums of money upon the faith of the contract and

relying upon the terms thereof and upon the decisions of the courts of the State adjudging the same to be valid, obligatory, and inviolable.

Not only had the court of appeals of Kentucky held the Stewart contract, relative to the franchise in dispute in this case, valid and binding, and, through a series of years, continuously upheld lottery grants and adjudged contracts made in relation to them sacred and inviolable, but this construction had been adopted by all the departments of the State government and by the municipal government of the city of Louisville, where the lottery was conducted.

The governor of Kentucky, in 1886, upon a meeting of the General Assembly of the State, submitted a message in which, after stating that lotteries were being operated in Kentucky which had been sustained by the court of appeals of the State, and that such lotteries should be licensed, he recommended that an act be passed upon the subject. Hence, on the 17th of May, 1886, the following law was enacted:

"Every corporation or person to whom a lottery franchise has been granted by the General Assembly of this Commonwealth, and which franchise has been declared by a judgment of the court of appeals to be a lawful and existing one, or the *lawful grantee*, alienee, legatee or assignee of such a franchise, shall be authorized to operate and conduct a lottery in this Commonwealth when he, she, or it shall have filed with the auditor of public accounts a certified copy of the judgment rendered, and the opinion delivered by the court of appeals in a case heard and determined before it, in which it has determined that a lottery could be lawfully operated under said grant from the General Assembly of this Commonwealth, and obtain from the said auditor a license (which he is hereby authorized and directed to issue

on the filing of said copies hereinabove required) reciting the filing of said copies and authorizing the operation of said lottery for one year from the date thereof on the condition that said licensee shall, within five days thereafter, pay to the said auditor of state the sum of two thousand dollars; and said license issued by the said auditor, as hereinabove directed, and any and all renewals thereof, as hereinafter provided for, shall be conclusive evidence in all the courts of this Commonwealth of the right of the licensee to operate a lottery for the period therein named. And if any corporation, person, alience, grantee, legatee or assignee of any lottery franchise granted by the General Assembly of this Commonwealth, and which has been declared by judgment of the court of appeals to be a lawful and existing one, shall operate a lottery in this Commonwealth without first having obtained the license hereinbefore provided for, the attorney general shall at once institute an action against it or him in the Franklin circuit court in the name of the Commonwealth, and shall recover therein the sum of three thousand dollars, besides the cost of the action, of which sum when collected, one thousand dollars shall belong to the attorney general. A *capias ad satisfaciendum* shall issue on the judgment against any person provided for in this act immediately after the rendition thereof. The license herein provided for shall be renewed on or before the first Tuesday in January in each and every year after the issuance of the original license hereinbefore directed, upon the request of the licensee or his assignee, and it shall, as is provided in the case of the original license, be conditioned on the payment of the tax of two thousand dollars herein provided for, and which renewal license shall authorize the licensee or his assignee to operate and conduct a lottery within this Commonwealth, and shall have the same legal effect as the original license, as hereinbefore provided."

By this act it is clear that the legislature of Kentucky recognized the legal existence of the lotteries and authorized

their operation, and under it the plaintiff in error and those under whom he claims paid the State of Kentucky two thousand dollars per annum until the institution of this action, having filed a copy of the opinion of the court of appeals of the State rendered in the case of *The Commonwealth vs. The City of Frankfort* with the auditor of public accounts, and obtained annually a license, in accordance with the act. The following acts have also been passed on the same subject:

Acts of 1887–'8, vol. 3, page 396, chapter 1194, amending act of May 12, 1884: For every lottery office, two hundred dollars per annum.

Acts of 1885–'6, vol. 2, chapter 1009, page 512, amending act of May 12, 1884.

Acts of 1883–'4, vol. 2, chapter 1423, page 1208, which corrects two errors in "An act to revise and amend the tax laws of the city of Louisville," approved April 25, 1884.

Acts of 1883–'4, vol. 2, chapter 1118, page 613. An act to revise and amend the tax laws of the city of Louisville, section 9, page 613: "For every lottery office or agency therefor, ($200) two hundred dollars."

Under an act establishing a new charter for the city of Louisville Ordinance No. 206, ordained: "The price of license for a year for keeping a lottery office shall be two hundred dollars." Approved October 29, 1853.

Elliott's Charter and Ordinances of the City of Louisville, 681.

Section 96 of the charter of the city of Louisville of March 3, 1870, provides:

"The sinking fund to pay the bonded debt is hereby continued as established by law."

Section 8, article 6, of the city charter of 1851 provides:

"That the proceeds of all the aforesaid licenses or *ad valorem* taxes levied in Louisville or any part of it, and the proceeds of all notes and bonds now held by the city of Louisville for money coming to her, whether due or not, also the net proceeds of the wharves and market-houses of said city, shall be, and are hereby, set apart as a fund to pay all the existing liabilities of said city, whether due or not due, and the accruing interest thereon, and until said liabilities shall be fully discharged or provided for as hereinafter directed, no portion of said funds shall in any manner be used or applied to any other purpose except as hereinafter provided, nor shall any warrant or order upon the treasurer, nor any demand against the said city, except upon liabilities now existing, be received in payment of any tax, license, or demand, or any source of revenue hereby appropriated to said funds."

By the 10th section of an act approved March 9, 1867 (see Sessions Acts of 1867, vol. 2, p. 420), the sinking fund is created a corporation separate and distinct from the treasurer of the city, its resources are provided for, and the general council is denied the power to pass ordinances or legislation to diminish the present resources of the fund until the debts of the city then or thereafter charged or chargeable upon said fund are paid, but may pass laws to increase said resources, etc.

By the 4th section of the act of March 15, 1869, entitled "An act to increase the resources of the sinking fund of the city of Louisville" (volume 2, p. 420, Acts of 1869), it is provided:

"The sinking fund shall be under the control and management of the commissioner of the sinking fund, and shall

be held and sacredly used for the payment of said bonded debt; the resources of the sinking fund shall not be diminished," etc.

The resources of the sinking fund are in part derived from the license tax on various corporations in the city of Louisville, and are dedicated by the charter and the acts hereinabove cited to the payment of the public debt of the city and the interest thereon as it matures. This constitutes a contract between the holders of the bonds and the municipality of the city of Louisville under express legislative authority.

City of Louisville vs. Murphy, 86 Ky., 60.
Von Hoffman vs. City of Quincy, 4 Wallace, 535.

These are briefly the facts showing the history of the rights of the plaintiff in error, as alleged in his answer in this action, and admitted by the demurrer to be true, and upon these facts we shall endeavor to show that the judgment of the court of appeals was erroneous and ought to be reversed.

The authorities chiefly relied upon by the defendant in error are based upon the principles claimed to have been announced by this Court in the case of *Stone vs. Mississippi*, 101 U. S., 814. We submit that the case has no application to the questions now presented. The State of Mississippi had by an act approved February 16, 1867, incorporated the Mississippi Agricultural, Educational, and Manufacturing Aid Society, and conferred upon it lottery privileges for twenty-five years. On the 15th of May, 1868, the constitutional convention of Mississippi adopted a new constitution, which provided "that the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed,

nor shall any lottery heretofore authorized be permitted to be drawn or tickets therein to be sold;" and an act was passed by the General Assembly, in pursuance of the constitutional provision, prohibiting all kinds of lotteries in the State.

The attorney general, in 1874, filed a petition in the nature of a *quo warranto* against John B. Stone and others, alleging that, without authority of law, they were then carrying on a lottery under the name of the Mississippi Agricultural, Educational, and Manufacturing Aid Society. The defendants in the case relied upon their charter privilege, claiming that they had obtained it from the General Assembly of Mississippi, by which they were authorized, in consideration of the payment of five thousand dollars per annum as an annual tax, to operate the lottery for the period of twenty-five years.

The State court held that the lottery franchise was abrogated and annulled by the constitutional provision of 1868. The only question submitted to this Court for decision was, whether or not the grant of the franchise by the General Assembly, while in the hands of the legislative grantee, was subject to repeal, and the court held that it was. We admit the proposition, and it has never been denied in any of the authorities we have been able to find. The right of a legislature or a constitutional convention to repeal a lottery grant and thereby withdraw the privilege, where no rights have been acquired or liability incurred in consequence of its passage, is clear and unquestionable. In the Mississippi case there was no claim to a lottery franchise, except by the original grantee. It stood in his name, with the undoubted power of the State to recall it at any time. No sale of the privilege had been

made, nor had any authority been conferred by the State upon the grantees to make a sale or a contract in reference thereto. There were no rights of any one involved, except those of the original parties to the transaction—the State of Mississippi and the Mississippi Agricultural, Educational, and Manufacturing Aid Society. The State of Mississippi, from the date of its admission into the Union (1817), never at any time authorized the operation of a lottery, until the enactment of the charter under which Stone asserted his right. The public policy of the State, unlike that of Kentucky, was uniformly opposed to lottery grants.

This Court decided (and could decide only) the question presented by the record, viz., whether or not the grantees of a lottery franchise had contract rights which were protected by section 10 of article I of the Federal Constitution against impairment by the new constitution of Mississippi. There is no reference in the opinion to the rights of third parties acquired from the grantee of the franchise under legislative authority; no such question was presented or could have been presented, and the decision is no authority upon that proposition. It is true that the *dictum* of the Court might be subject to the construction that no vested right exists in a lottery privilege, because a valid contract cannot be made by a State which would prevent it from exercising its police powers; but an analysis of the opinion will show that such is not the authoritative decision. The learned Chief Justice said:

"It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States

from passing laws impairing the obligation of contracts. The doctrines of *Trustees of Dartmouth College vs. Woodward*, 4 Wheat., 518, announced by this Court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them, to all intents and purposes, a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only *any contract the charter may contain*. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is whether a contract has, in fact, been entered into; and, if so, what its obligations are? In the present case, the question is whether the State of Mississippi, in its sovereign capacity, did, by the charter now under consideration, bind itself irrevocably by a contract to permit 'the Mississippi Agricultural, Educational, and Manufacturing Aid Society, for twenty-five years, to receive subscriptions, cast lots,' etc.—in other words, to operate a lottery?"

The Court held, in accordance with all the prior decisions in the various States of the Union, wherever the question had been presented, that the grant of Mississippi to the society contained no contract between the State and the corporation, and that therefore the constitutional provision had no application to the case. It is the same doctrine announced by the courts of Kentucky and by this Court long before the opinion in the case of *Stone vs. Mississippi* was delivered. The Chief Justice in his opinion further said:

"It is true that the legislature cannot bargain away the police power of a State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its succes-

sors to make such laws as they may deem proper in matters of police."

And the Court held that lotteries are proper subjects for the exercise of the police power of a State, citing the opinion of Mr. Justice Grier in *Phalen vs. Virginia*, 8 How., 163, to support that position. The language of the Court must be held to have been used with special reference to the facts of the case under consideration and the question involved. No vested rights of property arising upon contract were involved in the case, and, therefore, nothing that the Court might have said upon the subject would be authority; but the Court wisely refrained from saying anything upon the question of the rights of third parties to a lottery grant obtained for a valuable consideration under a contract made by authority of the State. Although Mr. Chief Justice Waite said that no "legislature can bargain away the public health or the public morals—the people themselves cannot do it, much less their servants"—yet we find the same learned judge, seven years afterwards, in the case of *City of New Orleans vs. Houston*, 119 U. S., 265, holding that the Louisiana State Lottery Company had a valid contract with the State of Louisiana, in its sovereign capacity, by which the State had bound itself irrevocably to allow the Louisiana Lottery Company to operate its lottery franchise for the period of twenty-five years, and that the grant of the charter could not be repealed or affected by subsequent legislation, because it was contained in the constitution of the State. It was held that the grant of the charter in the constitutional provision conferring the lottery privilege upon the Louisiana State Lottery Company withdrew the lottery franchise from the scope of the police power

of the State to be exercised by the General Assembly, so far as that company was concerned, and that the people had made a binding contract on the subject.

The Court said:

"And the charter of said company is recognized as a *contract* binding on the State for the period therein specified, except its monopoly clause, which is hereby abrogated."

And it held that the law taxing lotteries was invalid, so far as it affected the Louisiana Lottery Company.

It is well settled that an act of the legislature of a State, when not in contravention of a provision of the State or Federal Constitution, is as much an act of sovereignty as the declaration of a constitutional convention. A State legislature is invested with the whole sovereign power of the people, subject only to the limitations imposed by the constitution.

In the case of *McPherson vs. Blacker*, 146 U. S., 25, Mr. Chief Justice Fuller, in delivering the opinion of the Court, said:

"A State, in the ordinary sense of the Constitution, said Chief Justice Chase (*Fox vs. White*, 7 Wall., 721), is a political community of free citizens, occupying a territory of definite bounds and organized under a government sanctioned and limited by a written constitution and established by consent of the governed. The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature, unless the fundamental law power is elsewhere reposed," etc.

See also *Delmas vs. Insurance Company*, 14 Wallace, 669; *White vs. Hart*, 13 Wallace, 652; *Oliver, sheriff, vs. Memphis & L. R. R. Company*, 30 Ark., 128; *Osborne vs. Nicholson*, 13 Wallace, 656; *New Orleans Gas Co. vs. N. O. Light Co.*, 115 U. S., 650; *Gunn vs. Barry*, 15 Wall., 215.

It, therefore, follows, that *Stone vs. Mississippi*, as explained by the Court in the case of *New Orleans vs. Houston*, is an authority in favor of the plaintiff in error upon the proposition that the State, if it was clear that it intended to do so, could withdraw a lottery privilege from the police power of the State and make or authorize others to make a valid and binding contract in relation thereto, which would be protected by the Constitution of the United States.

Mr. Chief Justice Waite referred, as has been stated, to *Phalen vs. Virginia*, and based his decision in part upon the opinion in that case; yet we find that Mr. Justice Grier, in delivering the opinion of the Court in that case, substantially maintained the views for which we contend. The plaintiff in that case had been convicted on an indictment for selling lottery tickets contrary to the act of the Virginia legislature passed on the 25th of February, 1834. He pleaded that the act was in violation of the constitution of the State, forbidding the passage of a law impairing the obligations of contracts, because in 1829 the General Assembly had passed an act appointing five commissioners, whose duty it was to raise by way of lottery thirty thousand dollars for the purpose of making Fauquier and Alexandria turnpike road. On the 25th of November, 1834, the act for the suppression of lotteries was passed, containing these provisions:

"First. That nothing herein contained shall be construed

to the extent of, or interfere with, contracts already made for the drawings of any lotteries, the drawing whereof, by the provisions of such contracts, shall extend to a period beyond the 1st day of January, 1837; and

"Second. That nothing herein contained shall be construed to the extent of, or interfere with, any contract which may hereafter be made under, or by virtue of, any existing law authorizing the same for the drawing of any lottery, the drawing whereof shall not extend beyond the 1st day of January, 1840."

It will be seen that the decision of Mr. Justice Grier was rendered in a cause involving only the rights of the original parties to the grant, and he said (p. 166):

"It might admit of some doubt whether the act of 1829 grants any franchise or constitutes any contract, either with the commissioners therein appointed or with the turnpike corporation. It imposes certain duties upon each. The commissioners are required to use the license thus given, not for their own benefit, but for public purposes. The money procured by the proposed lotteries is to be paid over to the Fauquier and Alexandria Turnpike Road Company, to be by them expended in the improvement and repair of the road. It is true that the corporation might receive greater benefits from the repair of the road than the other citizens of the State, but the act imposes no duty upon them as a previous consideration. They are not required to make any repairs until they receive the money. But, assuming that this would be too narrow a construction of this act, and that it conferred a privilege or benefit upon the corporation in the nature of a *franchise or irrevocable contract*, yet in its very nature it cannot be considered illimitable as to time."

Again the Court said:

"When the legislature of Virginia passed this most salu-

tary act for the suppression of lotteries, *they, with commendable caution, protected all vested rights*, and, notwithstanding the neglect to perform the duties imposed by the act of 1829, the act of 1834 does not revoke the grant or annul the license, but limits the time to six years, within which time the duties must be performed."

Again:

"It is a part of the common law that the king cannot sanction a nuisance; but, without asserting that the legislative license to raise moneys by lotteries cannot have the sanctity of a *franchise or contract in its nature irrevocable*, it cannot be denied that the limitation of such a license as the present is as much demanded by public policy as other acts of limitation which have received the sanction of this Court."

It will be observed that the Court recognized that a lottery franchise may become the subject of an irrevocable contract, entitled to the protection of the constitutional provision against the impairment of contracts.

The case of *Boyd vs. The State*, 53 Ala., was between the original grantee and the State, and was not decided upon the question arising in this case; the act granting the privilege was held unconstitutional because the title did not express the subject-matter of the act, and this judgment was affirmed by this Court in 94 U. S., 645. No question was decided by the Court, except that the original act of incorporation was unconstitutional and void.

In the case of *Moore vs. State*, 48 Miss., 147, the issues presented were between the original parties to the grant. There had been no sale or transfer authorized or made, and the statutory bond required had not been executed before the adoption of the constitution of 1868.

The New Orleans Gas Light Company, 115 U. S., 650, was granted by its charter the exclusive privilege of furnishing gas to the inhabitants of New Orleans for the period of forty years. Afterward the constitutional convention adopted a provision by which it was declared that "the monopoly features in the charter of any corporation now in existence in this State, save such as may be contained in the charter of railroad companies, are hereby abolished," and by subsequent legislation certain rights were granted to the defendant, The Louisiana Light Manufacturing Company. The New Orleans Gas Light Company brought suit to enjoin the defendant from digging up the streets and supplying illuminating gas, etc., during the period of fifty years. In discussing the question this Court said:

"It is true, as suggested in argument, that the manufacture and distribution of illuminating gas by means of pipes or conduits placed, under legislative authority, in the streets of a town or city is a business of a public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. . . . But it is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort and in some sense to the public health and the public safety, and for that reason is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects. It is, consequently, claimed that the State may, at pleasure, recall the grant of exclusive privileges to the plaintiff, and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public

safety will constitute a contract the obligation of which is protected against impairment by the National Constitution. And this position is supposed by counsel to be justified by recent adjudications of this Court, in which the nature and scope of the police power has been considered."

The Court then proceeds to analyze the Slaughter House cases, reported in 16 Wallace, 62, the case of *Stone vs. Mississippi, supra*, and *Gibbons vs. Ogden*, 9 Wheat., 203, and other cases, and then says (page 522):

"Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers."

The Court said:

"We are referred to *Butchers' Union Company vs. Crescent City Company*, 111 U. S., 746, as authority for the proposition that the State is incapable of making a contract protected by the National Constitution in reference to any matter within the reach of her police power in its broadest sense; but no such principle is there established."

And the Court concluded by saying:

"It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested. Nor are we prepared to hold that the State was incapable—her authority in the premises not being at the time limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants by means of a valid contract with a private corporation of her own creation. We may repeat here what was said by Chief Justice Taney in *Ohio Life Insurance and Trust Company vs. Debolt*, 16 How., 428, in reference to the authority of a State to limit the exercise of its power of taxation: 'But whether such contract should be made or not is exclusively for the consideration of the State. It is the exercise of an undoubted power of sov-

ereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this Court has no control; for it can never be maintained in any tribunal in this country that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions. It is equally clear, upon the same principle, that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the power and rights of sovereignty which they themselves possess, or may restrict them within such limits as they deem best and safest for the public interest; yet if the contract was within the scope of the authority conferred by the constitution of the State, it is, like any other contract made by competent authority, binding upon the parties; nor can the people or their representatives by any act of theirs afterward impair its obligation. When the contract is made, the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this Court to carry it into execution. That duty must be performed.' And the Court granted the perpetual injunction asked for."

The same ruling was made in the case of the *Water Works Company*, 115 U. S., 673, the only difference being that in the latter case the right to supply water to the inhabitants of the State was involved, a matter clearly within the sovereign as well as the police power of the State; but the act granting the exclusive privilege was held to be a contract not subject to repeal or modification by the constitutional convention.

See *City R. W. Co. vs. Citizens' St. R. W. Co.*, 166 U. S., 557;
Indianapolis vs. Indianapolis Gas Light Co., 66 Ind., 396; *Indianapolis vs. Consumers, etc.*, 140 Ind., 107.

In the case of the *Wabash R. R. Co. vs. The City of Defiance*, decided by this Court May 10, 1897, it was held that the power of municipal corporations to establish and alter the grades of streets is a police power; and yet it is clear from the reasoning of the Court, and the cases cited, that in its opinion the legislature of a State might authorize cities and towns to make contracts with respect to the use of such highways which would prevent the subsequent exercise of the power to change grades or alter streets in such manner as to conflict with the rights of the other parties to the contracts. The *Philadelphia Railroad Company's Appeal*, 121 Penna., 44, is cited with approval, and is distinguished from the ordinary cases of such contracts upon the ground that "the act of the legislature gave the city express permission to grant to the company the use and occupation of its streets 'so long as said streets . . . shall remain open to public use and travel,' and declared that such grant should be 'as valid and effectual to transfer the rights and privileges therein contracted for to the said railroad companies or any of them . . . as if made between individuals.'" In the case cited, the city, after making the contract authorized by the statute, undertook so to alter the grade of the street as to make it cross the railroad at a level, thus destroying the overhead crossing, and it was held that this was a violation of the agreement.

There was no law in existence prohibiting the making of the contracts between Stewart and the city of Franklin and between Stewart's executrix and appellee when the contracts were made. No constitution of Kentucky prior to the one adopted in 1891 prohibited the granting of lottery franchises, as was done by the act of 1869, or prohibited the passage

of the act of 1872. The contracts were, therefore, valid and binding when made, and even if the construction contended for by the learned attorney general for the Commonwealth were correct, yet, according to the well-settled rule of law, the contract rights of appellee must be upheld.

In the case of *Joliffe vs. The Steamship Company*, 2 Wall., 450, Mr. Justice Field delivered the opinion of the Court in a case based upon the following facts: By an act of the General Assembly of California it was provided that all incoming and outgoing steamers from the harbor of San Francisco should be carried out of and into port by licensed pilots, and the law provided, among other things, that the first pilot offering his services to any steamship coming in or going out of port should be accepted, and, if refused, then one-half of the pilot fees should be paid by the vessel or master thereof to the pilot thus refused as a penalty. Joliffe tendered his services as pilot to the owner of the Pacific Mail Steamship Company, going out from San Francisco, and they were declined. The legislature repealed the law. In the meantime the pilot had instituted a suit for the recovery of his fees, and the California court decided that the repealing act destroyed his right of action. This Court said that "where a right inchoate in character is created under a statute, and there is afterward a repealing act which destroys the original act, the inchoate right exists in the party for whose benefit it was made, as a vested right, and gives him a vested right to the penalty."

In the same case it was said:

"There are many cases in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The claim of the plaintiff for

half pilotage fees resting upon a transaction regarded by the law as a quasi-contract, there is no just ground for the position that it fell with the repeal of the statute under which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute."

It will be observed that the statute in this case prescribed a police regulation, the piloting of steamers upon navigable waters, and provided a penalty for its violation, and the Court went so far as to hold that, in a case of this kind, a repealing statute, enacted after a right to the penalty accrued, was invalid to the extent of such right.

After the close of the late war, and following the reconstruction of the Southern States, many difficult questions arose, growing out of the condition of the people at the conclusion of the war, and the constitutional conventions of those States had to deal with them. Various constitutions provided that the legislature should not have the authority to confer upon any judge or court the power to give a judgment upon an obligation the consideration whereof was either the hire or sale of a slave. Suits were brought in the courts of Georgia and other States upon contracts both for the hire and sale of slaves made when the institution of slavery was lawful in those States, and this Court, in numerous cases, held that the contracts, being valid by the laws of the State at the time they were made, could not be impaired by subsequent constitutional prohibition. *White vs. Hart*, 13 Wallace, 646; *Osborne vs. Nicholson*, 13 Wallace, 654; *Boyce vs. Sabler*, 18

Wallace, 546; *Delmas vs. Insurance Company*, 14 Wallace, 661; *Gunn vs. Bary*, 15 Wallace, 610.

In the case of *Dodge vs. Woolsey*, 18 How., 401, the facts were, substantially: Prior to the adoption of the constitution of Ohio of 1851 a system of banking was established under the acts of 1845–'6 of that State, and it was enacted that the banks organized should pay during their corporate existence, in lieu of all other revenue and taxation, the sum of 6 per cent. upon their net earnings. The constitution of Ohio of 1851 provided that *all property shall be* equally taxed. The banks claimed that under the provisions of the act of 1845 they had a contract with the State of Ohio, irrevocable and irrepealable. The circuit court of the United States refused, upon the suit of Dodge, a stockholder in one of the banks, to enjoin the revenue authorities from collecting the tax. This Court, upon appeal, speaking through Mr. Justice Wayne, said:

"A change of constitution cannot release a State from contracts made under a constitution which permits them to be made. The inquiry is: Is the contract permitted by the existing constitution? If so, and that cannot be denied in this case, the sovereignty which ratified it in 1802 is the same sovereignty which made the constitution of 1851. Neither have more power than the other to impair a contract made by the State legislature with individuals. The moral obligations never die. If broken by States and nations, though the terms of reproach are not the same with which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less."

From 1709 to 1824, every budget submitted to Parliament by the British government, contained lottery schemes for the benefit of the Crown. Massachusetts, New Hampshire, Con-

necticut, Rhode Island, New York, Pennsylvania, Delaware, Maryland, New Jersey, North and South Carolina, Georgia, Alabama, Missouri—in fact, nearly every State in the Union—have provided for their schools, churches, and other private enterprises by lottery. The foundation of the present great library at Harvard University was laid by the operation of a lottery, and Yale has received and enjoyed revenues derived from the same source. The Government of the United States has authorized the operation of lotteries, and this Court has enforced rights in relation thereto. In *Washington vs. Young*, 10 Wheat., 406; *Shankland vs. Washington*, 5 Pet., 39, the contract of the municipality to receive the profits of the drawing was expressly recognized.

From the foundation of the United States Government down to a very recent date, lotteries have been resorted to for the purpose of recruiting the public revenues or maintaining churches and charities, and this, as has been shown, was the policy in Kentucky when the contract rights of the plaintiff in error were acquired.

In the year 1838, the supreme court of Tennessee, in the case of *Bass vs. The Mayor of Nashville*, reported in 1 Meigs, 421, upheld the doctrine contended for by plaintiff in error and made the distinction between contract rights and a mere gratuity or license, evidenced by the original grant of charter, laying down substantially, more than half a century ago, the same doctrine that was enunciated by this Court in the case of *Stone vs. Mississippi*, *supra*. In 1831, an act was passed by the legislature of Tennessee authorizing a lottery for the continuation of Union street, in the city of Nashville. The mayor and certain other persons, including John M. Bass, were appointed trustees with full power and authority

to manage and superintend the drawing of a lottery for the purpose of raising seventeen thousand dollars to be applied to the opening of a street in Nashville. The trustees were authorized to make a sale of the lottery tickets, to let out, farm, or sell one or more classes of the lottery, and to take bonds from persons to or with whom such sales or deposits might be made, and to do all things necessary to carry into effect the provisions of the act. The new constitution of Tennessee provided that "the legislature shall have no power to authorize lotteries for any purpose and shall pass laws to prohibit the sale of lottery tickets in this State;" and under this provision the legislature of 1835–'6 passed "An act to prohibit the drawing of lotteries and the sale of lottery tickets." The first section repealed all laws which authorized any person or body corporate or politic to draw any lottery for any purpose whatever, and the second section prohibited the drawing or attempt to draw any lottery in the State, under penalty of one thousand dollars and three months' imprisonment.

The third section prohibited the vending and selling of tickets. The trustees refused to draw the Union Street lottery after the passage of the acts named, and an action was brought to compel them to operate the lottery, and although the policy of that State, as declared by its legislature, had been opposed to lotteries in general, the court, in deciding the case, said:

"Lotteries then stood reprobated by legislative enactment and judicial decisions as contrary to public policy and to good morals, and a wise and enlightened public sentiment everywhere sustained the enactment and the decision. Under such circumstances, we ask, What was conferred upon the

defendant by the act of 1831, chapter 69? Nothing, certainly, but an immunity, in that particular instance and for the specified object, from penalties and indictments; an indulgence granted to them to perform acts which were in general held to be against public policy and good morals; a permission to do that for the doing of which all others would have been subjected to fine and imprisonment. If, then, *before the defendants had done anything under the act of* 1831, this privilege conceded to them, of gaming, without liability to criminal prosecution until they had realized a specified amount of profits, had been abrogated by a subsequent legislature and they had been placed upon the ground with all other citizens, of what could they have complained? Could they have, on just grounds, alleged that a contract had been impaired or a right divested? For this surely no one will contend. If, then, they had organized a scheme and had drawn one or more classes of the lottery, as the bill alleges was done, and, so to speak, one or two games had been played and finished, and the legislature finding a pause in their proceedings, *when no purchaser of a scheme* and no holder of a ticket could be injuriously affected, and availing themselves of this pause, had prohibited the further exercise of this extraordinary privilege, could the defendants be heard to object to the prohibition upon the ground that they had not realized all the profits which they had been promised and which they expected? Certainly not. In the precise state above supposed stood this matter when the convention in 1834 adopted the fifth section of the eleventh article of the reformed constitution, in which they provide that the legislature 'shall pass laws to prohibit the sale of lottery tickets in this State.' This was itself a prohibition, and was announced to the complainants before the formation of their contract with the defendants. And, again, although that contract is dated before the act of 1835, yet neither the bill nor the answer alleges that the complainants, before the passage of that act, were at any trouble, made any advances, or incurred any

liability whatever. They are therefore in no better situation with regard to the repealing law than the defendants."

Such was the decision of the supreme court of Tennessee more than a half century ago. The principles declared in the opinion of the court in that case are substantially the same more recently announced by this Court in the case so much relied upon by the attorney general in this one. "The lottery privilege," says the Court, in substance, "may be revoked when no purchaser of a scheme and no holder of a ticket can be injuriously affected thereby. When no third party is alleged to have made any advancements or incurred any liability whatever, the franchise may be destroyed, but not otherwise."

In 1839, the supreme court of the State of Delaware, in the case of *The State vs. Phalen and Payne*, 3 Harrington, 441–445, decided this question in the same way. The defendants were drawing a lottery under an act passed on the 14th of January, 1827. In 1831, an act was passed requiring each lottery company to pay the sum of ten dollars for each and every scheme or class drawn; and the question arose whether or not the latter act impaired the obligation of a contract in violation of the constitution of the State of Delaware. The court in that case said:

"We all agree that the act of 1827, authorizing the lottery to be drawn, is neither a grant nor a contract. It is a bare delegation of authority by which the drawing of a lottery is sanctioned until a certain amount or sum shall be raised for a certain purpose. If the act had confined the authority to the simple agency of the managers on behalf of the State, the question now presented might not have occurred; but in the act we find the managers are empowered to raise the

sum of ten thousand dollars, either by drawing the lottery themselves or through their agents, *or by a sale of the powers granted in the lottery act.* Hence, although we regard the act as making no grant or contract with the managers, we cannot disregard the authority granted to them to make a contract with others for a valuable consideration which would be binding on the State. While the authority or power delegated remained in the hands of the managers or agents of the legislature, it was subject to the control of the legislature, either to repeal, modify, or change. As a mere letter of attorney, it could be revoked; but, from the time when a contract was made under the authority conferred by the act to make a sale, a new state of things took place—an authorized contract between the managers and third persons, for a valuable consideration, conferred new rights and imposed new obligations. The contract having been made in pursuance of the powers contained in the letter of attorney, and in strict conformity therewith, as also to give effect to the purpose therein intended, must be obligatory upon the principal; nor under such circumstances can it be competent for the principal, even should he revoke the letter of attorney, to annul or even impair the contract; its obligation rests upon him as strongly as if he had himself primarily made it and received the consideration paid. Regarding, therefore, the legislature as the principal, under whose authority the contract of 1839 was made, we do consider they had no right to violate this contract or so revoke or modify the contract as to impair its obligations."

And the court held the act of 1831 void.

This question was adjudged in the same way in the case of *Phelan vs. Commonwealth*, 1 Robinson, 713, in the year 1842.

In 1842, in the case of *Davis vs. Caldwell, etc.*, 2 Robertson (La.), 271, brought to recover compensation for services ren-

dered by the plaintiff in aid of the drawing of a lottery in 1839, it was urged that lotteries were forbidden by the statutes of the State. The court in that case said: "The question whether the grant of the privilege to raise money by lottery, at first indefinite in point of time, may be afterwards limited, before any rights have been acquired under the first grant, is one which we think presents no difficulty. Such an act does not, in our opinion, impair the obligation of a contract nor destroy any vested rights. The permission to draw a lottery is not, *per se*, a contract, and, until it has been accepted and rights acquired under it, is perfectly within the control of the legislature," recognizing the same principle and the same distinction as contended for in this case and maintained by the decisions cited.

In the case of the *Mississippi Society of A. S. vs. H. Musgrove*, reported in 44 Miss., 837, relative to a lottery franchise, the court said:

"The State may take away by statute what has been given by statute, *unless rights under it have vested*. If the legislature delegate authority it can revoke it if nothing has been done under it which creates a vested right. . . . The authorities are abundant that the legislature may repeal a lottery grant, unless contracts have been made or rights vested, as between the grantees and other parties, which would be infringed by the repealing law."

In the case of *Boyd & Jackson vs. The State*, decided in 1871, reported in 46 Ala., 333, the appellants had been indicted under the general statutes of the State prohibiting lotteries and imposing penalties for carrying on the business of setting up and conducting a lottery. The defendants relied upon the act establishing the Mutual Aid Association and author-

izing a lottery thereunder. The latter act was repealed by the General Assembly of Alabama on the 8th of March, 1871, and the defendants contended that the State could not repeal the first act under which they claimed and for which they had paid two thousand dollars. The court said:

"From this statement of the case, it is very evident that the defendants, when they were indicted, were acting under a license granted by legislative authority. The repeal of the act of December 10, 1868, could not impair this right. It was the fruit of a contract, a vested right, which the State could not take away. It was fenced about and protected by the highest principles of justice and by the supreme law. The State had sold the privilege to set up and carry on a lottery for a year at least, and had received the price of the privilege in advance. This was clearly a contract, which the State is forbidden to impair. In such a case the State is the grantor, and it is estopped by its own act"—and cited the case of *Fletcher vs. Peck*, 6 Cr. R., 137, and other cases.

The court reversed the judgment, with directions to dismiss the indictment. To the same effect is the case of *Broadvent vs. Tuscaloosa Scientific and Art Association*, 45 Ala., 170. In the State of Missouri the right to operate lotteries has been a fruitful source of litigation, and the opinions of the supreme court of the State relative to this question have been cited and followed in nearly every State where questions of like character have arisen. The first case to which we call the Court's attention is that of *The State of Missouri vs. Jacob Hawthorn*, reported in 9 Mo., 393 to 396. Judge Napton, delivering the opinion of the court, said:

"Hawthorn was indicted by the grand jury of St. Louis county for selling lottery tickets in the lottery for the benefit

of the St. Louis hospital. On the ninth of February, 1833, the legislature of Missouri passed an act authorizing a lottery to be conducted for the purpose of raising money for the use of the Sisters of Charity in the city of St. Louis, and for the use of their hospital. By the second section of the act commissioners were appointed and were authorized to appoint a manager to sell the tickets and draw the lottery; the third section required bond, etc., from the manager. On the twenty-sixth day of February, 1835, a supplementary act was passed, similar in its character to the act of 1872, involved in this case. By the act of 1835, the Missouri legislature authorized the commissioners 'to contract with any person to have said lottery drawn in any part of the United States, on such terms as they shall consider most advantageous,' the commissioners to take bond, etc. On the twenty-eighth day of December, 1835, an agreement was made between the commissioners and one D. S. Gregory, by which, after reciting the acts of the General Assembly, as stated, and that the commissioners had agreed to dispose of the right of drawing the schemes of a lottery or lotteries for the purpose of raising the sum of money authorized by the act, provided that the commissioners, in consideration of two and one-half per cent. of the sales of tickets in this State, did sell, dispose, assign, transfer, and set over to said Gregory, sole manager and conductor of said lottery, and transfer to him the sole and exclusive right to draw such scheme or schemes, etc. D. S. Gregory assigned this contract to Walter Gregory, and Hawthorn was appointed by Walter Gregory as his agent. On the nineteenth of December, 1842, the legislature passed an act repealing all laws authorizing the drawing of any lottery or the sale of any tickets within the State of Missouri, imposing heavy penalties for its violation."

It was for the violation of this statute that Hawthorn was indicted. The lower court held that Hawthorn and

his employer, Walter Gregory, had a vested right, dismissed the indictment, and the State appealed the case. The Supreme Court said:

"The only question arising in this case is, whether this last-mentioned act, so far as it affects the present defendant, is contrary to that clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts. Our opinion in relation to the act of February 9, 1833, was intimated in the case of *Freheigh vs. The State*, and the opinion is still entertained that laws of this character do not create any contract. Neither the commissioners appointed under the act nor the Sisters of Charity, for whose benefit the money was to be raised, acquired any interest which subsequent legislation could not take away. That act did not create any contract between the State and the commissioners or between the *cestuis que trust* which could not be modified or repealed at the pleasure of the legislature. The money proposed to be raised was a mere gratuity, without consideration, and the commissioners being merely the agents of the legislature, the law imposed no obligation upon a succeeding legislature to continue their authority or permit the drawing of the lottery and the sale of the tickets. The act of February 26, 1835, presents a different aspect. By that act the commissioners were authorized 'to contract with any person to have said lottery drawn in any part of the United States, *on such terms as they shall consider most advantageous.*' We have no difficulty in saying that a contract made in pursuance of this act is as much obligatory upon the State as upon the other contracting party, and the legislature could pass no law impairing its obligation."

The Court held that the contract with Gregory was authorized by the act and concluded its opinion by saying:

"We are aware that it is, at all times, a delicate task for a court to question the validity of a legislative enactment. It

is certainly an unpleasant one where the court feels every disposition to sustain the act whose obvious tendency is to suppress an evil and promote public and private morals. These considerations, however, cannot be permitted to discharge us from the performance of a duty imposed by the constitution, and especially where reason and justice unite with the constitutional prohibition in teaching that a legislature can no more violate a contract made by themselves or under their authority than they can rescind or alter or impair the obligation of one made between private individuals."

And the judgment dismissing the indictment was affirmed.

State vs. Morrow, 26 Mo., 131, decided in 1857, maintained the same doctrine. In the case of *The State of Missouri vs. Miller*, 50 Mo., 132, the facts appeared as follows:

The appellant had been convicted in the lower court for selling lottery tickets in the Missouri State lottery for the benefit of the town of New Franklin, the same lottery involved in the case of *The State vs. Morrow*, cited above. In the other cases, acts of the General Assembly had been passed repealing the lottery or inflicting penalties for operating a lottery in the State; but, when the Miller case was tried, there had been a new constitution adopted by the State of Missouri, by which lotteries in the State were prohibited. And the court upon this question said:

"Where a contract, when made, is valid by the laws of the State as then expounded by the departments of the Government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent constitutional ordinance or act of the legislature or decision of its courts altering the construction of the law. The establishment and continuance of a lottery is doubtless an evil, but its abolishment by throwing down the legal barriers which have been built up for the protection of the citizen and his property would be a still greater evil."

And the court held that the question had been conclusively settled in the cases of Hawthorn and Morrow, and ordered the discharge of the defendant. This opinion was delivered in 1872.

The next case is that of *The State of Missouri vs. Miller*, 66 Mo., 329 to 347, which was precisely like the case at bar, except that the provision embodied in the new constitution of Missouri, adopted in 1865, was more comprehensive in its terms than section 226 of our present constitution, the language of the Missouri constitution being:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift-enterprise tickets in any scheme in the nature of a lottery in this State, and all acts or parts of acts heretofore passed by the legislature of this State authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby repealed."

The attorney general of the State filed a proceeding in the nature of a *quo warranto* in behalf of the State to oust the defendants from exercising the franchise of operating the lottery for the benefit of the town of New Franklin (referred to in the other cases), and the defendants answered and claimed that by virtue of a contract made on the first of June, 1842, by Gregory with the trustees of the town of New Franklin, and the modification thereof made on the eleventh of April, 1849, they were authorized to enjoy the privilege of selling tickets and conducting the lottery until the year 1877, having acquired by purchase from the representatives of said Gregory all the rights accruing to him under said contract.

The act incorporating the town of New Franklin granted the right to its trustees to raise by lottery the sum of fifteen

thousand dollars for the purpose of building a railroad from said town to the Missouri river, and in 1835 the General Assembly authorized the sale of the lottery privilege.

The lower court decided against Miller. The supreme court, Judge Norton delivering the opinion, said:

"Anterior to the adoption of the constitution of 1865, there was nothing in the organic law prohibiting the legislature from establishing lotteries. Until then they had the right to pass laws authorizing or forbidding the sales of lottery tickets. Under the constitution of 1820 the General Assembly had the power to authorize the town of New Franklin, through its trustees, to raise money by way of lottery, and this we understand to be conceded; nor is it denied that the act of 1835, empowering the said trustees to contract with any other person for the drawing of the lottery, was a legitimate exercise of legislative power."

The court said further:

"The contract of 1849 was so made because by the act of 1833 the town of New Franklin became a public, as contradistinguished from a private, corporation, and such public corporations are called into being at the pleasure of the State, and neither the charter nor act of incorporation is in any sense a contract between the State and the corporation. The same voice which speaks them into existence may speak them out. Such corporations are the auxiliaries of the government in the important business of municipal rule, and cannot have the least pretension to sustain their privilege or their existence upon anything like a contract between them and the legislature. When the State, however, does create such agency, and through it contracts with a third person, whereby rights become vested in such person, it is then beyond its power to divest them, for such contract is *pro hac vice* the contract of the State, the obligation of which it cannot impair without trampling under foot that provision of

the Constitution which declares that no State shall pass any law impairing the obligation of a contract; and if such agency make a contract with a third person touching a subject in reference to which the State has authorized it to contract, and such contract is imperfectly made, it is within the power of the State to validate it."

Again, on page 344:

"So long as the power conferred by the act of 1835 upon the trustees to contract with other persons for drawing and managing said lottery remains unexecuted by them, the State, through its legislature, could have taken from the town of New Franklin the right to raise money in that way, such right being a mere bounty, subject to recall or repeal without such repealing law being obnoxious to the prohibition against the passage of a law impairing the obligation of contracts. When, however, this power is executed and a contract concluded, whereby a third person acquires the right to conduct and manage a lottery, another and different question is presented and the rights thus acquired become vested by the act of the State and cannot be taken away, except by the terms of the contract."

And the court concluded by saying:

"We have been driven to our conclusions by former adjudications of this court, the correctness of which we do not question. As to the impolicy of the act of the General Assembly in granting the privileges it did to the town of New Franklin, whereby the sale of lottery tickets has for years been authorized, against the sense of the people of the State and to the debauchery of the public morals, we have nothing to say; nor have we anything to do with the fact that the trustees in making the Gregory contracts and the legislature in ratifying them have acted unwisely, and continued till the year 1877 a business yielding large profits

and gains to one contracting party and comparatively small to the other. We are to look to the contract, and if fairly made, uncorrupted by fraud and untainted by illegal considerations, it is our duty to enforce and uphold the legal rights which it confers. Security to the rights of person and property demands a strict adherence to this rule, and it cannot be overleaped, even though the purpose be to correct either a supposed or really great evil."

In all the cases cited, the questions involved were identical with the questions now under consideration. They all related to grants of lottery privileges and sales made under authority of the State, and the courts of all the States named unanimously held that, where a contract had been made relative to such a franchise by a third party with the original grantee under the authority of the State, such third party became the owner of a vested right of property, which could not be divested by subsequent legislation or constitutional ordinance; and we do not think a single case from any State can be produced deciding otherwise.

In Kentucky the decisions have been uniform upon this subject until the present case arose. The first case decided by the court of appeals involving a lottery franchise was *McIrane et al. vs. Holmes et al.*, Sneed's Report, p. 377. The court held the act of the legislature, which interfered with the operation of the lottery, was unconstitutional. This was the first decision of the court of appeals which adjudged an act of the General Assembly to be unconstitutional, and was delivered in May, 1804; it was followed by *Gregory, executrix, vs. Trustees of Shelby College Lottery*, 2 Metcalf, 589. The litigation in this last-cited case arose under an act of the General Assembly of the State

of Kentucky, passed in February, 1838, conferring upon the Shelby College a lottery privilege to raise a sum of money not exceeding one hundred thousand dollars. By the third section of the act the managers were authorized to sell and dispose of the scheme or any classes of said lottery upon the execution by the purchaser of a bond. Under this authority the franchise was sold to one Gregory. In the meantime, after the death of all the managers named in the act granting the lottery privilege, William I. Waller, an Episcopal clergyman, who had advanced money upon the faith of the lottery grant, brought his petition, claiming to be entitled to the benefits resulting from the lottery privilege, and asked the court to appoint other persons as managers to control and dispose of it and render it profitable. The circuit court appointed other persons to act as managers, and an appeal was taken, and it appeared to the satisfaction of the appellate court, as it did to the circuit court, that the contract entered into between Gregory and the managers of the Shelby grant had not been made according to the provisions of that act, and was, therefore, insufficient to confer upon him (Gregory) the franchise which was conferred upon the managers, and which they were authorized to sell; but Waller having loaned money, he was held to have the rights of a mortgagee and entitled to a lien upon the grant and a right to operate the same until he was reimbursed the money thus advanced, and this right, it was held, could not be affected by the provisions of the Revised Statutes by which all lottery grants were to cease and determine three years after the adoption of the revision. The Revised Statutes went into effect July 1, 1852, and the repeal took effect, therefore, on July 1, 1855. The court of appeals,

in delivering its opinion through Chief Justice Simpson, said (p. 671):

"It was provided by the Revised Statutes that at the expiration of three years after the revision took effect all rights and privileges which had been granted by the legislature of this Commonwealth to raise by lottery money for any purpose should cease and determine. The grant of a privilege to raise money by a lottery is a mere gratuity. It is not an act of incorporation; it confers no charter rights, nor does it amount to a contract. The power of the legislature to repeal the grant, and thereby withdraw the privilege, where no rights have been acquired under the act by which it was created, nor any liability incurred in consequence of its passage, is, therefore, clear and unquestionable.

"It was said by this Court in the case of *Covington and Lexington Railroad Company vs. Kenton County Court*, 12 B. Mon., 147, that it cannot be denied the legislature possesses the power and the right to take away by statute what has been given by statute, unless rights have been vested under the law before its repeal. If the legislature delegate an authority it can certainly be revoked before the power has been exercised in such a manner as to create a vested right.

"A repeal of a statute necessarily terminates all proceedings under that statute, unless rights have accrued under it which cannot be legally divested.

"It was, therefore, held in that case that the legislature had the power to repeal an act to amend the charter of the railroad company by which a mere privilege only was conferred, and that the repealing act having been passed before any rights had been acquired under the amendment, it was not unconstitutional. Although, therefore, the legislature has the power to repeal the grant of a lottery privilege where no rights have accrued under it, and though lotteries have a demoralizing tendency and exercise a very pernicious influence over the ignorant and credulous part of the community,

and for this reason have been almost universally denounced by the law-making power in the different States of the Union, *yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant*, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then to the extent of such rights, at least, the law must be regarded as unconstitutional and inoperative. This conclusion is, we think, fully sanctioned by the following adjudged cases: *Dartmouth College vs. Woodward*, 4 Wheat., 518 to 643; *Fletcher vs. Peck*, 9 Cranch, 88; *University of Maryland vs. Williams*, 9 Gill & Johnson, 365; *Berry vs. Taylor*, 9 Cranch, 52; *City of Louisville vs. University of Louisville*, 16 B. Mon., 642.

"The plaintiff, Waller, before the repealing act was passed, had, on the faith of the lottery grant, advanced large sums of money which were appropriated by him for the benefit of Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. As the lottery privilege was granted for the benefit of the Shelby College, and the money was advanced by Waller with the assent of the trustees of the college, under the belief that it would be realized eventually from the lottery, he becomes thereby invested with the right to the use of the grant until from such use the sum was produced which he had advanced for the benefit of the college. This was a vested right of which he could not be divested by an act of the legislature. So far, therefore, as the repealing act interferes with or affects this right, it is unconstitutional and inoperative."

This decision has been followed in nearly all the cases decided in this country, involving the question, since it was rendered. It followed the rule laid down in the case of *Bass vs. The Mayor of Nashville, supra*, and the other cases

decided before 1859; it laid down the same doctrine substantially that was stated by this Court in the case of *Stone vs. Mississippi*. The doctrine declared in these cases was recognized, as we will hereafter show, as the law of Kentucky since it was decided, in 1859, until the decision of the case now before this Court. It was so decided after the act of 1838 was passed granting the city of Frankfort the lottery privilege, heretofore referred to, and after the grant to the Henry College lottery, passed in 1850, and it was as firmly established as any other rule of property in the State.

In the case of the Public Library of Kentucky, decided by the court of appeals November 1, 1877, Judge Lindsay delivered the opinion of the court and held the act incorporating the public library of Kentucky to be valid legislation, and that, pursuant to a contract entered into with the library company, Thomas E. Bramlette, ex-governor of the State, and his associates had the right to five drawings by way of lottery. The action was brought by Little and others, who had purchased five hundred dollars' worth of tickets for the fifth and last drawing or entertainment, claiming that the entertainments and distribution of prizes were frauds on the act of incorporation, and sought to recover the money paid by them for tickets. The court said:

"The material facts stated in the petition, excluding all the irrelevant matter pleaded, support the averment that the distribution of prizes at the fifth and last drawing was in the nature of a lottery, and, if appellees are correct in their construction of the grant, was manifestly in excess of the power and privileges delegated to the corporation. That the grant to the library was in the nature of a lottery privilege is perfectly clear, and when its object and purpose are considered it is difficult, if not impossible, to say that the legislature

intended to limit the sales of tickets to entertainments to persons who in good faith expected to attend them, and to prohibit the distribution of prizes to any other than such of the patrons as should actually be in attendance. A great public library was established, which, in the language of the act of incorporation, is to be forever free to the gratuitous use and enjoyment of every citizen of the State of Kentucky, and of all good citizens of every State in the Union who shall comply with the rules and regulations made by the trustees. . . . That the legislature intended to confer lottery privileges on the corporation does not admit of question. The grant is clear and explicit and unmistakable, and the sole inquiry presented by this case is whether the five distributions of prizes or gifts were to be proportioned to the purpose declared in the preamble of the act, or limited and restricted by the inference arising from the time, place, and circumstances at and under which each distribution was to be made. There is no express limitation in the grant as to the sums of money to be raised by the lottery privilege, nor as to the number or prices of the tickets to be issued and sold for the several entertainments, nor as to the amounts to be distributed in the way of prizes."

Again, the court said:

"An exceptional right, like that of a lottery privilege, will never be raised by implication or construction; but when, as in this case, the grant is expressly made, it becomes a delicate matter for the courts to imply limitations, not in terms expressed by the legislature, in order to protect the public morals or prevent the grantee from reaping benefit of a fraud supposed to have been practiced on the law-makers. It is the duty of the courts to ascertain, if possible, the legislative law, and to uphold and enforce it inside of constitutional limitations, without regard to policy of the legislature or the motive of the legislators. It may be proper, in construing an act of the legislature, to look to its effects and conse-

quences when its provisions are ambiguous or the legislative intention doubtful; but when the law is clear and explicit and its provisions are susceptible of but one interpretation, its consequences of evil can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action. The effect and consequence of this lottery grant were undoubtedly to promote the spirit of gambling, and thus debauch the public morals; but the grant being clear and unmistakable, the duty arising on the judiciary is to determine whether the legislature intended the privilege to be exercised within certain implied limitations or to be upon a scale sufficiently extended to secure the establishment of the free library on a permanent, self-sustaining basis."

And the court held that the limitation upon the ground contended for did not exist, and concluded the opinion by saying:

"The object and intention of the legislature were not only plainly manifested by the general provisions of the act, but are expressly declared by the preamble, and the means devised to secure the success of the public charity cannot be impaired by judicial construction, however objectionable they may be. The responsibility for the evils resulting from legislation like this rests with the law-makers and not with the courts. It is neither their duty nor their right to undertake to correct or limit such evils by encroaching on the exclusive domain of legislative power. The lottery grant is not void by reason of the provisions of section 37, article 2, of the State constitution. It is a legitimate, although it may be an objectionable, mode by which to raise the funds necessary to establish the free library. In view of these conclusions we cannot decide that the fifth and last drawing or distribution of the prizes by the library and its agents was unauthorized and illegal. We need not determine whether the contract between the library and Bramlette was or not

judicious or proper, nor whether the trustees have misapplied or misappropriated the profits arising out of the exercise of the lottery grant. These are matters in which these appellees have no interest."

It will be seen from this case that, though the lottery grant was obtained in behalf of the public library of Kentucky by practicing a fraud upon the General Assembly, and there was danger of the proceeds being diverted, yet the court recognized its validity and the efficacy of contracts made under it and refused by construction to place a limitation upon the grant, recognizing in its fullest sense the right of the General Assembly to grant lottery privileges and to authorize contracts thereunder, adopting the true rule that the judiciary construes a law according to its letter and spirit, without regard to the policy or impolicy of the legislation.

On February 11, 1878, the case of J. N. Webb against the Commonwealth was decided by the Court. The facts as stated in the opinion were:

"By an act of the legislature approved December 9, 1850, the appellants, J. N. Webb, etc., were authorized to raise by lottery for the Henry Academy and Henry Female College a sum not to exceed fifty thousand dollars, the trustees to execute bond in the sum of one hundred thousand dollars, to be approved by the Henry county court. The third section empowered them to sell the scheme or any class thereof, but before the vendees are permitted to have a drawing of the lottery they are required to give bond to comply with the provisions of this act, and to file the same in the Henry county court. The Commonwealth, by attorney general, filed in the Franklin circuit court a petition against the appellants and S. T. Dickinson, Z. E. Simmons, and others as

vendees of said managers, in which it is sought to perpetually enjoin them from using the grant. A general and special demurrer to the petition was overruled, and appellants answering, the demurrer to their answer was sustained and judgment entered in conformity with the prayer of the petition. The petition shows that the managers, December 9, 1850, sold to William Gregory the exclusive right to operate the lottery for the sum of fifty thousand dollars, to be paid in annual installments of one thousand dollars each, and that under the contract the sum of twenty-three thousand five hundred dollars has been paid to the managers for the purpose mentioned in the act. Gregory assigned his interest in the grant to Simmons, which was ratified by the managers.

"It is contended by the Commonwealth that section 6, article 21, chapter 28, of the Revised Statutes repealed the act under which appellants claimed. That section reads as follows: 'Three years after this chapter takes effect, all rights and privileges which may have been granted by the legislature of this Commonwealth, to raise money by lottery for any purpose, shall cease and terminate.' The Revised Statutes went into effect on the first day of July, 1852, and this section became operative on the first day of July, 1855. As the managers sold the right to Gregory on the nineteenth of December, 1850, and he regularly paid the annual installments of one thousand dollars to the managers for the use specified in the act, we are of the opinion that Gregory, before the adoption of the Revised Statutes, had acquired such rights under and upon the faith of the act of December 9, 1850, that the attempted repeal cannot affect him or his assignees. In the case of *Gregory vs. The Trustees of Shelby College Lottery*, 2 Met., 598, this Court said:

"'If rights have been acquired or liabilities incurred upon the faith of the privileges conferred by the grant, it would be obviously unjust to permit such rights to be divested by the legislative revocation of the privilege. If, therefore,

vested rights had been acquired under the present grant before the passage of the repealing law, then to the extent of such rights, at least, that law must be regarded as unconstitutional and inoperative. It seems clear that the execution of this contract and the compliance on the part of Gregory gives him and his assignees a vested right to use the franchise to reimburse themselves to the extent of their obligations.'"

And the court, speaking through Judge Hines, concluded by reversing the case, with directions to dismiss the petition.

This case was followed by *The Commonwealth vs. Douglas*, decided November 25, 1882, after the decision of *Stone vs. Mississippi* was rendered by this Court, which was presented to the Court upon the argument; and it was decided after the act of 1878 had been passed repealing all lottery grants in the State. The Court in delivering the opinion said:

"The opinion of this Court in the case of *J. N. Webb vs. Commonwealth*, delivered September 11, 1878, is conclusive of the principal questions raised in this case. That case was between the same parties in interest here, was decided upon its merits on facts admitted in the pleadings, and established the following proposition as the law applicable to the lottery grant approved December 9, 1850, authorizing the raising of fifty thousand dollars for the benefit of Henry Academy and Henry Female College.

"*First.* That the grant was not repealed by the Revised Statutes which went into effect July 1, 1852.

"*Second.* That the transfer to Gregory by the trustees and by Gregory to Simmons and Dickinson vested in the latter the right to raise by lottery the sum of fifty thousand dollars.

"*Third.* That there has been no use made of the franchise up to the fourteenth of February, 1877, the time at which the pleadings were completed in the Webb case, and therefore no question of exhaustion prior to that time could arise.

"The instructions of the court below and the ruling of the court in the admission and rejection of evidence were in conformity to the three propositions stated, and therefore no error was committed to the prejudice of the Commonwealth. Judgment affirmed."

That was an indictment against J. J. Douglas, the present plaintiff in error, found by the grand jury of the Jefferson circuit court at the November term, 1879, charging him with selling lottery tickets contrary to the act of the General Assembly. Douglas gave in evidence the grant of 1850 for the benefit of Henry County College, the transfer to Gregory, and claimed the right to operate the lottery by contract through Gregory and his assignees. His position was sustained, the court holding that a vested right in the lottery franchise had been obtained by Webb, Gregory, and others which could not be divested by legislative repeal.

The next decision, in point of time, was in the case of *Commonwealth vs. Whipps*, decided May 18, 1882, reported in 80 Ky., page 269. The facts in that case were briefly these:

Whipps was authorized by act of the General Assembly, passed in 1880, to dispose of the Willard Hotel property, in Louisville, by way of lottery, for the purpose of paying off his debts, and certain persons were named as managers for the protection of the creditors, who were to be the beneficiaries of the receipts arising from the net earnings of the lottery. Whipps proceeded to advertise his drawing and sell tickets therein. He was indicted in the Jefferson circuit court, and upon the trial the indictment was dismissed; from which judgment an appeal was taken to the court of appeals. The court, among other things, said:

"Lottery grants are now in existence in this State, and their constitutionality has never been denied, nor can the

theory of counsel be maintained, that their validity is upheld by reason of, or in consideration of, public service. There is no more obligation on the State, through its legislature, to maintain a public school at Frankfort than there is to pay the debts of appellee; and, if so, why grant a lottery privilege to the one college and deny the right to a like college located in a different locality? It is conferring a privilege on one and withholding it from the other. These are, in fact, mere special privileges acquired under legislative grant for the advancement of private or local interests, that in no manner violates the rights of others, and neither grant can be said to have been made in consideration of public service. *The motive prompting the legislature to make the grant cannot be inquired into by this court.* 'Plenary power in the legislature for all purposes of civil government is the rule,' with uncontrolled authority in making the laws within the limits of the constitution. This court has nothing to do with the moral question involved; if it had, the case could be easily disposed of. 'The legislature makes, the executive executes, and the judiciary construes the law.' As an additional argument in favor of the constitutionality of the measure is the practical construction placed upon this section of the bill of rights by the constant legislation of the State conferring special privileges since the formation of the State constitution. 'When such is the fact,' says Cooley, 'a strong presumption exists that the construction rightly interprets the intention; and besides,' says the same author, 'where the question of construction, after all the investigation given the subject, remains a matter of doubt, it is clear that the court should abstain from deciding it unconstitutional.' The appellee, Whipps, was involved in debt, and the legislature, upon his application, granted him the privilege of selling his property by lottery at a single drawing, the proceeds to be applied to the payment of this indebtedness. The extent of the grant and the power conferred by it is not questioned. The Commonwealth, after making the grant, has indicted him for proceeding under it, and is insisting that he shall

be fined in the sum not exceeding ten thousand dollars for promoting a lottery. No other party is complaining, and the citizen, by reason of the grant, deprived of no right he had when the grant was made. Can this penalty be enforced? And is the act unconstitutional? Both questions must be answered in the negative, and the judgment below is therefore affirmed."

As late as 1888, the grant in this case was upheld as a property right in an action brought in the Louisville law and equity court by *Lawrence vs. Simmons & Dickinson*, alleging that he had acquired an interest in the operation of the lottery in controversy in this case through Stewart, and that Simmons & Dickinson were operating it without accounting to him for his part of the profits, and prayed that they be compelled to account to him for his portion of the profits. Upon appeal the court said:

"If the facts alleged in the petition filed by the appellant are true, and they must be so regarded on the demurrer, we perceive no reason why he is not entitled to relief. The lottery franchise was sold or transferred under and by virtue of a legislative enactment of the city of Frankfort to E. S. Stewart, who became the sole owner, and Stewart afterwards transferred two one-hundredths interest to Reamer, who transferred the same through Stewart to Lawrence, the appellant," and after stating the prayer in the petition, the court says: "The validity of the franchise or the right of the defendants to further operate the lottery are not involved on the appeal, but the simple question presented is, Will the appellant under the transfer be permitted to participate in the profits?"

This brings us to the decision in the case of *The Commonwealth vs. City of Frankfort*, upon which the plaintiff in error bases his plea of *res adjudicata*.

The opinion of the court was as follows:

"In 1878 the attorney general of the State filed a petition in the name of the appellant, in which it is charged that the board of councilmen of the city of Frankfort claimed that it had an unexhausted legislative privilege to raise large sums of money by running and operating a lottery for the benefit of the city school of Frankfort. It is further charged that the board of councilmen of the city of Frankfort claim that by legislative authority it had the authority to sell and transfer the lottery privileges, and that in 1875 it did undertake to sell and convey to one Stewart its pretended lottery franchises and privileges, and that Stewart has sold to others, who are engaged in selling lottery tickets, etc., and that appellee Pepper and others, under the name and style of the 'Kentucky Cash Distribution Company,' proposed to have a grand drawing of prizes on the first of August, 1876. It is further charged that Pepper and others have advertised this drawing extensively, and are engaged in the sale of tickets by thousands, at twelve dollars for a whole ticket, six dollars for a half ticket, and at the same ratio for a smaller fraction of a ticket, and that they propose a distribution of several hundred thousand dollars to the lucky drawers of prizes. It is further charged that in 1838 the legislature of this State authorized one hundred thousand dollars to be raised by way of lottery, to be expended for the benefit of the city school of Frankfort, and for the erection of proper machinery by which to supply the city with water to be conveyed from Cove Spring. It is, however, charged that the amount authorized to be raised by the act of 1838 has long since been received by the proper city authorities, and that the attempted sale by the city and the exercise of lottery privileges by its pretended vendees are without authority of law and injurious to public morals by tempting the people into the immoral practice of gaming. The appellant made the councilmen of the city of Frankfort, the city school trustees, and Stewart and others defendants, and asked

the court to enjoin the defendants from proceeding further to sell tickets and operate the lottery privileges claimed by them, and finally the court was asked to cancel, annul, and adjudge void the privileges claimed by the appellees. The defendants demurred to the appellant's petition. The court overruled the demurrers, except so far as the suit sought to affect the rights of the parties under and by virtue of the act of 1838; but, on the refusal of the attorney general to make the board of managers of the lottery privilege granted in 1838 parties, the suit was dismissed, so far as it affected defendants' rights under that act. This is an ordinary action brought to prevent the usurpation of a pretended franchise and is authorized by section 529 of the former Code of Practice, as was decided by this Court in the case of *Commonwealth vs. The City of Frankfort and others*, 13 Bush., 186. The board of councilmen answered the petition of appellant and asserted its right to operate a lottery by legislative grant for the support of the city schools of Frankfort, and the other defendants claimed as beneficiaries or vendees of the said board of councilmen. On hearing, the lower court dismissed appellant's petition, and that judgment is here for revision. On the first day of February, 1838, the legislature by its enactment vested in a board of managers the right to raise, by way of lottery, one hundred thousand dollars in one or more classes, as to them might seem proper. One half of this sum was to be appropriated 'to the use and benefit of a city school in the town of Frankfort, and the other half for the construction of such reservoirs, pipes, and conductors as may be necessary and proper to convey the water from the Cove Spring into said town.' The second section provides that the managers shall not reserve more than 20 per cent. of the prizes, and the fourth section authorizes the managers to dispose of the entire lottery scheme or any classes thereof for not less than 10 per cent. of the prizes proposed to be drawn. On the 16th of March, 1869, the legislature passed an act entitled 'An

act to amend and reduce into one the several acts in relation to the city of Frankfort.'"

This is the same act set forth in the petition in this case.

The court proceeds to say:

"And by an act approved March 28, 1872, the board of councilmen of the city of Frankfort were authorized to sell and transfer all property or franchises belonging to the city, and by these several acts it is claimed that the board of councilmen have a clear legislative grant of the right to raise one hundred thousand dollars by way of lottery, and that neither they nor their vendees can be operating or running a lottery in violation of law til' he authorized sum has been raised, which has not been d[illegible]." . . .

The act of March 2[illegible], 1872, is the same one under which the plaintiff in error acquired his rights in this case.

The court further said:

"We therefore conclude that the legislature of 1869 conferred on the board of councilmen of the city of Frankfort franchises, powers, and authority equal or exactly similar to those that had by the act of 1838 been conferred on the managers, which include the privilege of raising one hundred thousand dollars by operating a lottery."

And the court, upholding the act of 1869, decided that it created a separate and distinct new lottery grant, equal to or identical with that conferred upon the trustees or managers under the act of 1838 to the city of Frankfort; that the act of 1872, authorizing the sale and transfer, was valid, and that the sale to Stewart was made in conformity therewith, and it dismissed the petition of appellant.

It seems to us clear that this decision, rendered in an action brought by the plaintiff in error in this case against

Stewart, under whom the defendant in error claims, upon the identical grant in dispute in this case, is conclusive as to the validity of the grant of 1869, its construction and effect, as well as the scope and effect of the act of 1872, and of the contracts made thereunder.

We do not dispute the proposition made by the able judge of the law and equity court, that the plea of *res adjudicata* in a proceeding against a party charged with the usurpation of a franchise is not a bar to a subsequent *quo warranto* proceeding based upon supervenient causes; but we submit that the question as to the validity of the grant of 1869 to the city of Frankfort, and of the enabling act of 1872, and the fact of the purchase by E. S. Stewart in strict conformity to the enabling act, the judgment of the court in the case of *Commonwealth vs. City of Frankfort and E. S. Stewart* is conclusive; because there are no supervenient causes which affect any of these questions. A State is as much bound by a judgment as an individual. This proposition is fully settled by the cases of the *Utica Insurance Company vs. Scott*, 8 Cowan, 709; *Hart vs. Harvey*, 32 Barbour, 67; *Hobson, etc., vs. Commonwealth*, 2 Duvall, Ky., 172; Angell & Ames, Corporations, sec. —, 10th ed. If such changes had taken place since the judgment in that case was announced as would create a new or different cause of action, the plea of *res adjudicata* would not be good; but, upon the questions arising relative to the franchise and contract involved in this case, that judgment is necessarily conclusive.

The rule is stated by Cooley, in his work on Constitutional Limitations, to be:

"A decision once made in a particular controversy by the highest court empowered to pass upon it is conclusive upon

the parties litigant and their privies, and they are not allowed afterward to revive the controversy in a new proceeding for the purpose of raising the same or any other question. The matter in dispute has become *res adjudicata*, a thing definitely settled by judicial decision, and the judgment of the court imports absolute verity. Whatever the question involved, whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of finality is the same. The controversy has been adjudged; and, once finally passed upon, it is never to be renewed." (Cooley on Constitutional Limitations, p. 58.)

Ever since the Duchess of Kingston's case, 20 St. Tr., 355, this rule has been so firmly established in our jurisprudence that it cannot be the subject of controversy. The only question that can ever arise is as to the application of the rule to the facts of the particular case before the court. The rule itself has been approved and applied in so many cases by this Court that it would be tedious to enumerate them. In a very recent case, *City of New Orleans vs. Citizens' Bank*, decided May 24, 1897, Mr. Justice White, who delivered the opinion of the Court, said:

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res adjudicata* cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text books and enforced by many

decisions of this Court. A brief review of some of the leading cases will make this perfectly clear.

"In *Bank vs. Beverley*, 1 How., 134–139, it was held that a construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In *Tioga R. R. Co. vs. Blossburg, &c., R. R. Co.*, 20 Wall., 137, and *Mason Lumber Co. vs. Buchtel*, 101 U. S., 638, it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes.

"In *Cromwell vs. Sac*, 94 U. S., 353, after a full statement of the nature of the estoppel resulting from the thing adjudged where the demand was the same in both cases, the Court then considered the extent of the estoppel where the causes of action were distinct, and said (p. 853):

"'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.'

"It is unnecessary to multiply citations of authority, as the subject has been quite recently fully considered and passed upon by this Court. In *Last Chance Min. Co. vs. Tyler Min. Co.*, 157 U. S., 687, where an estoppel resulting from the thing adjudged was enforced, this Court said (p. 687):

"'The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to

the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is, therefore, not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided. (*Hopkins vs. Lee*, 6 Wheat., 109; *Smith vs. Kernochen*, 7 How., 198; *Pennington vs. Gibson*, 16 How., 65; *Stockton vs. Ford*, 18 How., 418; *Washington, &c., Steam Packet Co. vs. Sickles*, 24 How., 333; *S. C.*, 5 Wall., 580; *Lessee of Parrish vs. Ferris*, 2 Black, 606; *Cromwell vs. County of Sac*, 94 U. S., 351; *Davis vs. Brown*, 94 U. S., 423; *Russell vs. Place*, 94 U. S., 606; *Campbell vs. Rankin*, 99 U. S., 261; *Lumber Co. vs. Buchtel*, 101 U. S., 638; *Stout vs. Lye*, 103 U. S., 66; *Nesbit vs. Riverside Independent District*, 144 U. S., 610; *Johnson Company vs. Wharton*, 152 U. S., 252.)'

"And the law of Louisiana is exactly in accord with the rulings of this Court, for, as said by the supreme court of Louisiana in *Heroman et al. vs. Louisiana Institute of Deaf and Dumb et al.*, 34 La. An., 814:

"'No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness. (Cooley on Const. Lim., p. 47 *et seq.*, and authorities there cited.)'

"'Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to and certain of reversal in a higher court.' (Bigelow Est., 3d ed., Outline, pp. lxi, 29, 57, 103.)

"'The estoppel extends to every material allegation or statement which, having been made on one side and denied

on the other, was at issue in the cause and was determined therein.' (*Aurora vs. West*, 7 Wall., 102; 4 N. Y., 113; 2 An., 462; 14 An., 576; 19 La., 318; 5 N. S., 664; 11 M., 607; 14 La., 233; 5 N. S., 170.)

"It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

Mr. Justice Campbell, in delivering the opinion of this Court in *Jetter vs. Hewitt et al.*, 22 How., 363–'4, said:

"The authority of *res adjudicata* as a medium of proof is acknowledged in the civil code of Louisiana, and its precise effect in the particular case under consideration is ascertained in the statute that allows the proceeding by monition. Under the system of that statute the maintenance of public order, the repose of society, and the quiet of families require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence that commentators upon it have said the *res adjudicata* renders white that which has been black, and straight that which is crooked. No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."

> See *Com'rs of Sinking Fund vs. Green and Barren River Nav. Co.*, 79 Ky., 75, and also *Barbour vs. City of Louisville*, 83 Ky., 95.

The law of Kentucky is also exactly in accord with the decisions of this Court upon the subject of *res adjudicata*. It has been frequently decided by the court of appeals that the

judgment of a court of competent jurisdiction is not only conclusive of all matters determined by it, but of all incidental matters which might and ought properly to have been then asserted and decided. (See *Snapp vs. Snapp*, 10 Ky. Law R., 600, and cases cited.) This doctrine is recognized by this Court in *Brownsville vs. League*, 129 U. S., 505, in which Mr. Chief Justice Fuller said:

"*Res adjudicata* may make straight that which is crooked, and black that which is white."

In *Dowell vs. Applegate*, 152 U. S., 343, Mr. Justice Harlan, in delivering the opinion of the Court, reviewed the prior decisions upon the question, and said that—

"A judgment by a court of competent jurisdiction as to parties and subject-matter is a finality in respect to the claim or demand in controversy, including parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other reasonable matter that might be offered for that purpose."

Johnson & Co. vs. Wharton, 152 U. S., 257.
Last Chance Mining Co. vs. Tyler Mining Co., 157 U. S., 683.
Lessee of Parrish vs. Ferris, 2 Black, 606.
Nation et al. vs. Johnson et al., 24 How., 197.

Applying these principles to the case at bar, the action being between the same parties, plaintiff in error being privy in estate, having purchased the grant from Stewart after the judgment, the issue as to the validity of the grant and contract being the same, the questions now sought to be determined were conclusively determined in that case. No supervenient right in behalf of the State as against the legality

and validity of the contract has arisen or been discovered since the decision. The passage of the act of 1890 and the adoption of the constitutional provisions did not create any new right, but will, if the construction of the Commonwealth be adopted, destroy prior legal rights fixed by the former judgment.

It is alleged in the answer, and admitted to be true upon the demurrer, that, based upon the decisions of the various courts in the United States, and especially the decisions of the Kentucky court of appeals, Douglas acquired his property in the franchise in controversy. After its complete and unqualified recognition by the executive, legislative, and judicial departments of the State government, he in good faith paid large sums of money for the franchise and expended large sums upon it, and created obligations, relying upon the integrity of the State and its various departments of government to uphold the contract rights acquired under a legislative enactment and sanctioned by judicial decisions in the State, without a single exception, for a period of more than thirty years.

The principle of *stare decisis* is nowhere better stated than by Judge Cooley, who, in his work on Constitutional Limitations, says:

"All judgments, however, are supposed to apply the existing law to the facts of the case; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened. There would thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a sub-

sequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable. . . . If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons and upon a clear manifestation of error."

Cooley on Const. Lim., 61.

Citing with approval, by note, numerous cases, especially the case of *Nelson vs. Allen*, 1 Yerg., 376, in which Judge White said:

"Whatever might be my own opinion upon this question, not to assent to its settlement now, after two solemn decisions of this Court, the last made upward of fourteen years ago, and not only no opposing decision, but no attempt even by any case, during all this time, to call the point again in controversy, forming a complete acquiescence, would be, at the least, inconsistent, perhaps mischievous, and uncalled for by a correct discharge of official duty. . . . The most able judges and the greatest names on the bench have held this view of the subject, and occasionally expressed themselves to that effect, either tacitly or openly, intimating that if they had held a part in the first construction they would have been of a different opinion; but the construction having been made, they gave their assent thereto. Thus Lord Ellen-

borough, in 2 East, 302, remarks: 'I think it is better to abide by that determination than to introduce uncertainty into this branch of the law, it being often more important to have the rule settled than to determine what it shall be. I am not, however, convinced by the reasoning of this case, and if the point were new I should think otherwise.' Lord Mansfield, in 1 Burr., 419, says: 'Where solemn determinations, acquiesced under, had settled precise cases and a rule of property, they ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute.'"

In the case of *Louisiana vs. Pillsbury*, 105 U.S., 297, which was an action to compel the city of New Orleans to levy a tax for the payment of certain coupons on outstanding bonds issued under an act of that State in 1852, the State of Louisiana passed an act postponing the levy and collection of the tax in 1874. In 1876, by an act of the General Assembly, it attempted to repeal the tax, and although the tax was imposed relative to the institution of slavery, and although slavery had been abolished and there were no longer slaves upon whom taxation could be levied, it was held that the obligation of the State to raise the required fund by special tax on real estate remained inviolate. The decision of the Court was rendered in 1881 by Mr. Justice Field, and upon the proposition under discussion he said (page 302):

"Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The

construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two States expressed in the same terms is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it. The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine of this subject is aptly and forcibly stated by the Chief Justice in the recent case of *Douglas vs. Pike County*, 101 U. S., 968: 'The true rule (he observes) is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment—that is to say, make it prospective, but not retroactive.' After the statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of legislative enactment." (Citing *Gelpecke vs. Dubuque*, 1 Wall., 175; *Havemeyer vs. Iowa County*, 3 Wall., 294; *Thompson vs. Lee County*, 3 Wall., 327; *Olcott vs. Supervisors*, 16 Wall., 678; *Fairfield vs. Gallatin County*, 100 U. S., 47.)

In the case of *Olcott vs. The Supervisors*, 16 Wall., 690, cited in the foregoing opinion, the Court said:

"This Court has already ruled that if a contract when made was valid under the constitution and laws of the State, as they had been previously expounded by its judicial tribunal and as they were understood at the time, *no subsequent action by the legislature or the judiciary will be regarded by this Court as establishing its invalidity.* (*Havemeyer vs. Iowa City*, 4 Wall., 294; *Gelpecke vs. Dubuque*, 1 Wall., 175; *Ohio Life and*

Trust Co. vs. Debolt, 16 How., 432.) Such a rule is based upon the highest principles of justice. Parties have a right to contract and they do contract, in view of the law as declared to them, when their engagements are formed. Nothing can justify us in holding them to any other rule."

The Court referred to and adopted the language of Chief Justice Taney in the case of *Ohio Life and Trust Co. vs. Debolt*, 16 How., 432, heretofore cited. The doctrine thus broadly announced has been enforced and recognized wherever the question has arisen, so far as we have been able to find upon investigation. The construction of a statute by the highest courts of the State which created it will be followed by the Federal courts, provided such construction is clear and *was made before the facts occurred out of which the question for adjudication arose.*

> See *Allen vs. Massey*, 17 Wall., 354; *Townshend vs. Todd*, 91 U. S., 452; *Scipio vs. Wright*, 101 U. S., 665; *Buchu vs. Railroad Co.*, 125 U. S., 555; *Bacon vs. N. W. L. I. Co.*, 131 U. S., 258; *Equator Co. vs. Hall*, 106 U. S., 86; *Brine vs. Insurance Co.*, 96 U. S., 627.

If a contract is valid by the laws of a State, as then construed by its courts, subsequent decisions altering the construction of the laws will not be followed by the United States courts. (*Douglas vs. Pike Co.*, 101 U. S., 677; *Anderson vs. Santa Anna*, 116 U. S., 356; *Carroll vs. Smith*, 111 U. S., 556.) To the same effect are the cases of *Post vs. Supervisors*, 105 U. S., 667; *Burgess vs. Seligman*, 107 U. S., 20; *Green Co. vs. Corness*, 109 U. S., 105. This Court has declared that "the sound and true rule is that if the contract when made was valid by the laws of the State, as then expounded by all the departments of the government and administered in its

courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation or decision of its courts altering the construction of the law." (*Ohio Life and Trust Co. vs. Debolt*, 16 How., 432; *Gelpecke vs. Dubuque*, 1 Wall., 175–206; *Douglas vs. Pike Co.*, 101 U. S., 677; *Louisiana vs. Pillsbury*, 105 U. S., 278; *Rowan vs. Runnels*, 5 How., 134; *Green vs. Neal*, 6 Pet., 297; *Shelby vs. Gary*, 11 Wheat., 368; *Taylor vs. Ypsilanti*, 105 U. S., 72; *Fairfield vs. County of Gallatin*, 100 U. S., 52.) "A party who acts in accordance with the law as laid down by the highest tribunal in the State, while it is still law, shall not suffer because it is subsequently set aside and another and inconsistent rule substituted for it." (Sutherland on Statute Construction, p. 319.)

We can add nothing to the force of these authorities by argument. The application of the rule of *stare decisis*, as stated by these courts, to the case at bar is simple and conclusive. And this rule has been forcibly stated by the court of appeals of Kentucky in numerous cases, and is a well-settled doctrine of law in that State. Beginning with the case of *South's Heirs vs. Thomas' Heirs*, 7 Monroe, 61, a suit involving a question under the law of descent, etc., the court said (page 61):

"We are all well aware that the courts of England gave the construction contended for by the appellants to their statute, and the Supreme Court of the nation has given the same construction to ours, although differently expressed from the English statute; but this court, in the case of *Machir vs. May*, etc., 4 Bibb, 43, and afterward in the case of *Scutney vs. Overton*, 4 Bibb, 466, has had occasion to notice the different expressions in our statute and consider their effect, and has been compelled to say that, on casting a descent to minors, the bar ceases, and that the expression, or 'coming

to *them*,' means the hour when the action accrues to *them* who are within the savings of the act. . . . It has been often said that it is not so important that the law should be rightly settled as that it should remain stable after it is settled. This is true, for attempts to change the course of judicial decision, under the pretext of correcting error, are like experiments by the quack on the human body."

And in the case of *Tribble vs. Taul*, 7 Monroe, 455, upon the question of regulating courts of equity, it was said:

"If we were convinced that on this point the law was settled wrong originally, we should not feel ourselves at liberty to depart from it, aware that it is of greater importance to society that the rule should be uniform and stable than that it should be the best possible rule that could be adopted. In the supreme court of a State, as this is, possessing, with but few exceptions, appellate judicial power coextensive with the State, the influence which its decisions must have is evident. Its mandates are conclusive, and even its *dicta* are attended to in all the inferior courts. No sooner is a decision published than it operates as a pattern and standard in all other tribunals, and, as a matter of course, all other decisions conform to it. If in this court a settled course of adjudication is overturned, then the trouble and confusion of reversing former causes succeeds in the inferior tribunals, and even the credit and respect due to this court is shaken by the phenomenon that A has lost his cause on the same ground that B gains his. And not only do these consequences follow, but some still more serious may ensue, for perhaps no court may strike the vitals of society with a deeper wound than a capricious departure in this court from one of its established adjudications. We ought, therefore, to be cautious not to leave a course well understood, and nothing but the imperious demands of justice could justify it."

And the court held that, as the principle under discussion had been decided and recognized by the court for nearly

twenty years, it would not depart from it. Nowhere is this doctrine stated with greater vigor of language than by the court of appeals in the well-considered case of *Franklin County Court vs. Louisville & Nashville Railroad Company*, 84 Ky., decided in 1886. It that case there was an effort on the part of Franklin county to compel the Louisville and Nashville railroad to pay a tax upon the assessment of so much of its road as was located in Franklin county and a proper proportion of its rolling stock. The suit was brought to enjoin the county from levying the tax upon the ground that it had been previously held that this special part of the road was exempt from local taxation, and the court said:

"It is a part of the general jurisdiction of the chancellor, as held by this court in the case of the *L. & N. R. R. Company vs. Warren County Court*, 5 Bush., 243, to stay by injunction illegal proceedings to assess and sell property for taxes. Numerous grounds are urged in this instance why it should be done, but it is only necessary to consider one of them. Prior to the act of March 17, 1876 (*vide* General Statutes, page 881), our statute did not expressly provide, either as to county or State taxation, that *all* property, save that specifically exempted, should be liable.

"Undoubtedly, however, this is the general rule, and the exemption is the exception. Inequality of taxation, whether local or general, is inconsistent under a government where all share alike its benefits, and should therefore bear the burdens equally. The power of taxation is necessary to governmental existence, and every person or corporation protected by it should contribute his or its just proportion to its support. This is obviously true as to the local as well as the State government. All are interested in the purposes which render county or local taxation necessary. These general views have often been announced from this bench, and are beyond dispute.

"This court, however, decided in 1868—which is the very year from which the claim of the appellant dates—in the case of *Applegate, etc., vs. Ernst, etc.*, 3 Bush., 648, that a portion of a railroad in a county was not a part of the county property as to county taxation, but was an entirety, and liable in its consolidated character for State revenue only.

"This case was followed by that of *L. & N. R. R. Co. vs. Warren County Court, supra*, to the same effect, and this remained the law of the State, as declared by its highest judicial tribunal, during all the years covered by the tax claim of the appellant.

"The legislature, knowing that no statute existed expressly declaring that *all* property should be liable for county taxation, save that specifically exempted, and recognizing the law to be as announced by its court of dernier resort, on March 17, 1876, passed an act providing that *all* the property in a county not specially exempted by law should be liable for any county *ad valorem* tax, and that all the property of any railroad company and that of various other kinds of corporations therein named should be assessed for such purpose.

"It may therefore be said that the non-assessment of the appellee during the years for which taxes are now claimed was recognized as proper by both judicial decision and legislative action. This court, as now organized, fails to recognize any sufficient reason why that portion of a railroad within a county should not have been held liable for county taxes is prior to the legislative declaration in the act of 1876. It shared in the protection and advantages afforded by the local government. Its liability for its proper proportion of the expense incident thereto would not at most necessarily have impeded its proper use by either the owner or the public, and the fundamental rule of at least approximate equality of taxation, it seems to us, should have been applied to it. *The law, however, as then declared and recognized, was otherwise.* The acts of the legislature relating to Franklin county of January 9, 1868, and March 16, 1869, did not alter it as to

this particular county, because the taxation thereby authorized was upon all 'the taxable property' of the county, and it must be considered that the legislature had in view only such property as was then taxable under the then law as declared by this court. The appellee did all that was then required of it as to listing its property or paying its taxes. No demand was made of it to do more, or for the tax now claimed, for a period ranging from eight to fifteen years from the time when it accrued. . . .

"From 1868 to 1875, inclusive, it was, however, the law, as declared by this court, that the road of the appellee was not taxable for county purposes. There was no express statutory provision to the contrary. Rights were acquired and duties performed in accordance with the then law as announced and understood, and in the absence of an express statute to the contrary the then construction of the law must be held to be *the* law governing the acquisition of rights or the performance of duties of that period.

"It is well settled that if a contract be valid under the law, as previously expounded by the courts and as understood at the time, no subsequent judicial action will render it invalid. Parties have the right to and do contract with a view to the then law as declared."

It will be observed that this case decides the two most important questions involved in this action:

First. It sustains to the full extent the doctrine of *stare decisis*, and adjudges that where a right under a contract or statute has been adjudged one way for a period of seven years *only*, the decisions of the court constituted a rule of property governing the action of the people, and cannot be departed from subsequently, even though the court might be unanimously of the opinion that the former decisions were wrong.

Second. It reaffirmed the proposition that if a contract be valid under the law as expounded by the courts when it was

made, no subsequent judicial action can render it invalid; from which it follows,

Third. That the act of 1890 and section 226 of the constitution must be construed as applying only to a charter franchise where no contract rights had accrued, and cannot affect rights acquired under a lawful contract made while the charter or grant was in full force.

The court of appeals held, in the case of *Franklin County Court vs. Deposit Bank of Frankfort*, 87 Ky., 380, that—

"The State of Kentucky, in the management and control of her affairs, in her relation to the other States, and in her relation to the Federal Government, except in so far as certain powers are delegated by the Constitution of the United States to the Federal Government or are denied to the States, is sovereign by right. It is by virtue of her sovereignty that she has the power to contract. No binding contract can be entered into except by virtue of sovereign power. It is by this power that the State makes contracts with individuals; that she borrows money and gives her obligation for its payment. To deny a State the power to make binding contracts is a denial of its power as a sovereign.

"Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contracting, does not barter away his sovereignty; he, for a valuable consideration, simply exercises it; for a valuable consideration coming to him from the other party to the contract, he surrenders something and receives something in its stead which he deems an equivalent. Whether the one or the other has, in fact, received an intrinsic equivalent for that with which he has parted is not the question. The fact that it is of more or less value and deemed by him to be an equivalent is all that is required to make the contract irrevocably binding. In thus contract-

ing, *he does not surrender his sovereign power; he merely exercises it.* Upon precisely the same principle the Commonwealth contracts. If her contract is without any valuable consideration, it is a *nudum pactum;* so is that of the citizen; but if there is a valuable consideration to support, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State, possessing the power to make, for a valuable consideration, a binding contract, falls within that provision of the Federal Constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts she stands upon precisely the same footing that individuals do in reference to their contracts—she shall pass no law impairing their obligation."

In *Mattox et al. vs. Graham and Knox*, 2 Met., 85, the court of appeals of Kentucky said:

"We cannot esteem it otherwise than an imperative duty to dispose of the constitutional question thus raised in very brief time. In this court it is not now a question open to argument. It is one which has been formerly before the court, was thoroughly argued, maturely considered, and was solemnly and authoritatively decided. It was not a similar question arising in a case somewhat analogous to this, but it was identically the same question—the constitutionality of the very laws now brought to the consideration of the court.

"In the language of the supreme court of Pennsylvania in the case of *The Commonwealth*, by Thomas, *vs. The Commissioners of Allegheny County*, we say: 'The question should be at rest. We cannot agree with the counsel that because it is a constitutional question it should be treated as always open. Where the meaning of the constitution on a doubtful question has been once carefully considered and judicially de-

cided, the instrument is to be received in that sense and every reason is in favor of a steady adherence to the authoritative interpretation.' In the supreme court of Pennsylvania, when the case of *Sharpless vs. The City of Philadelphia*, which involved a constitutional question like this, was before that court, two judges dissented from the opinion of the court, which was in favor of the constitutionality of the law; and yet, when a similar question was presented to the court in the case of *The Commonwealth vs. The Commissioners of Allegheny County*, the court felt bound by the decision in the Sharpless case.

"And in this case there are even stronger reasons than any which existed in that in favor of the steady adherence to the authoritative interpretation of the constitution given in the Slack case. As said by Judge Lowery in the Allegheny Bond case, 'We have before us now quite another question. In the Slack case it was simply a question of the constitutionality of the law. Now it is a question of the validity of contracts, in which the law is only one of the elements.'"

These decisions show that the doctrine of *stare decisis* and the right of the State to authorize valid sales of lottery privileges have been recognized in Kentucky for more than half a century, and we respectfully submit that it is too late now to reverse the whole current of judicial action and destroy property rights lawfully acquired upon the faith of these deliberate and repeated adjudications.

If this can be done, the citizen certainly holds his rights by a most precarious tenure; not the settled law of the land, but a fluctuating public sentiment, will determine whether he shall or shall not continue to enjoy the benefits of lawful contracts in which he has in good faith invested his money. Surely this is not a propitious time to sanction such a de-

parture from the long-established principles under which the rights of property have heretofore been secured to the people.

But it may be contended that the repeal and revocation relied upon by the defendant in error were authorized by the Kentucky act of 1856, now incorporated in the General Statutes of the State in the following words:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, *no amendment or repeal shall impair other rights previously vested.*" (Chap. 68, sec. 8, p. 862.)

As to the right to repeal the grant itself, either with or without the authority reserved in this statute, there can be no controversy; but the repeal of the grant cannot, either under the statute or upon general principles of law, "impair other rights previously vested."

See *Sinking Fund Com'rs vs. Green and Barren River Nav. Co.*, 79 Ky., 73–83; *Lou. Water Co. vs. Clark*, 143 U. S., 16; *Commonwealth vs. Railroad Co.*, 95 Ky., 75; *Lou. Gas Co. vs. Citizens' Gas Co.*, 115 U. S., 698; *Orr vs. Bracken Co.*, 81 Ky., 593; *Wendover vs. Lexington*, 15 B. Mon., 258.

The act of March 22, 1890, did not purport to do anything more than repeal the grant to the city of Frankfort and the act authorizing the city to sell and transfer the lottery privilege (Record, p. 2). It was in substance and effect the same in all respects as the various repealing acts previously passed, which the highest judicial tribunal in the State had repeat-

edly held did not in any manner affect contracts lawfully made while the grants were in force, and we are bound to assume that the legislature did not intend this repealing act to have any greater or more comprehensive effect than the courts had given to similar statutes in the past. So construed, it was not intended to destroy or impair a valid contract already made, but was designed simply to repeal the grant itself and prevent future contracts. In *Sinking Fund Com'rs vs. Green & Barren River Nav. Co.*, 79 Ky., 73, the court said:

"The charter of the appellee has not been repealed, but only so much of it as relates to the lease, and if there had been a repeal of the charter by reason of the statute of 1856, the provision of the first section of that act, 'that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested,' would secure to the appellee its right under the lease."

This decision was cited and approved by this Court in *Louisville Water Company vs. Clark*, 143 U. S., 16.

In *Commonwealth vs. Essex Co.*, 13 Gray, 239, the Court said: "When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away property rights which have become vested under a legitimate exercise of the powers granted;" and in the case of the Broadway Surface Railroad Company (*People vs. O'Brien et al.*, 111 N. Y., 1–66), the court, after a careful examination of the authorities, decided that "constitutional or statutory powers for the repeal of statutes providing for the creation of corporations or the amendment of charters of corporations do not confer power to take away or destroy property or annul contracts, and an express reservation in such a statute of power to take away or destroy property lawfully acquired, under authority conferred by a char-

ter, or any legislation which authorizes such a result to be accomplished indirectly, is unconstitutional and void."

In *Close vs. Glenwood Cemetery*, 107 U. S., 466, this Court said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant or any right vested under it, and which the legislature may deem necessary to secure either that object or any public rights." See also Sinking Fund cases (*Union Pac. R. R. Co. vs. United States*, 99 U. S., 700).

The entire clause contained in the constitution is as follows:

"Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and no schemes for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked." (Record, p. 2.)

It is evident that the whole provision, except the last sentence, looks to the future, and is directed to the legislature; it is a limitation upon the power of that body respecting grants of lottery privileges in the future, and an injunction upon it to enforce the section by proper penalties. After having thus apparently completed the section and provided for its enforcement, the framers of the instrument seem to have determined to go a step further and revoke the lottery grants and privileges already existing; but they did not attempt, in terms, to annul any contracts that may have been theretofore lawfully made under such grants, and, in view of the long and uniform course of decisions in the State sus-

taining the validity of such contracts and holding that they could not be destroyed or impaired by a mere repeal or revocation of the grant, it cannot be presumed that the constitutional convention intended, by the language employed, to do anything more than revoke the grants, leaving all contracts, which were lawful when made, in full force, according to the established rule of the courts. If it had been the intention to overthrow, or attempt to overthrow the settled law and policy of the State concerning the inviolability of such contracts, and their exemption from the effects of a statute which simply, in terms, repealed the grant, appropriate language would certainly have been used for that purpose. We are not at liberty to assume that the framers of the organic law of the State were so ignorant of the rules of construction and of constitutional guarantees as to suppose that the words "all lottery privileges or charters heretofore granted are revoked" included lawful contracts previously made between private individuals. The courts had decided again and again, as we have already shown, that such words, or words of similar import, did not include contracts and did not affect them in any manner. The "privileges" and "charters" which are "revoked" are those, and those only, that have been "granted" by the legislature. The contract under which the plaintiff in error claims is not a charter; the privileges he claims were not granted to him or to his vendee; they were acquired by a contract lawfully made, upon a full consideration. The grant was made to the city of Frankfort, and legislative authority was given to the city to sell and transfer the privilege for a valuable consideration, which was done long before the passage of the act of 1890 or the adoption of the constitution; and this identical sale

and transfer had been recognized as valid and binding by the supreme judicial tribunal of the State in a civil proceeding instituted by the State itself for the express purpose of preventing the vendee from exercising the privilege claimed under it. We are bound, under such circumstances, to assume that the constitutional provision means just what it says, and no more, and that its framers knew the legal meaning and effect of the language they employed; and, if so, there was not even an attempt to annul or impair the contract involved in this case.

But the court of appeals, overruling all its previous decisions upon the same question, has given to the legislative act and the constitutional provision a construction which not only impairs, but destroys, the contract, and it is the province of this Court to correct the error and maintain the authority of the Federal Constitution over this important subject. The fact that a lottery privilege is involved in the controversy in no way affects the application of the ordinary rules of law to the case. If, when a repealing act is passed or a constitutional prohibition is adopted, there is a contract in existence which was lawful when it was made, neither the act nor the constitution can destroy or impair it, no matter whether the contract relates to a lottery privilege, a banking privilege, or a right to the title or possession of lands or goods. The fundamental question in all such cases is, whether there was a legal contract in existence at the time of the legislative or other act of the State complained of, and if there was such a contract, whatever may have been its subject-matter, and the legislative or other act impaired its obligation, it is the duty of this Court to enforce the constitutional prohibition and protect the rights of the injured party.

We insist upon the broad doctrine that no State can, in the exercise of its police power or any other power, destroy or impair any right which is secured to the citizen by the Constitution of the United States. Of course, the right must be established, it must be shown that a right exists; and, when that is done, it is secured by the supreme law of the land and must be protected by the Court. The undefined and undefinable attribute of sovereignty known as the "police power" may be sometimes successfully appealed to by the State for the purpose of showing that a binding contract in regard to a particular subject could not be made, but it can never be invoked to destroy or impair the obligations of a contract legally entered into by the State itself or by its citizens. Most assuredly, it cannot be invoked to destroy or impair the obligations of a contract which the State, by the action of all its departments, has again and again declared to be valid and binding and which was entered into by the citizen on the faith of such declarations.

The State is the guardian of its own sovereignty, and whether it can, in the exercise of its sovereign power, make a valid contract concerning a particular matter, or authorize its citizens to make a contract, is a question for it to determine, and, when it has determined that question in the affirmative and the contract has been made, it is binding upon the State or upon the citizen, as the case may be. If the contract made by the State does not affect its relations to the Union or violate any law of the United States, or if the contract made by its citizens under its authority is free from such objections, this Court, in administering the Constitution, cannot say that the transaction was an abandonment or surrender of the State's sovereignty or of its police power, and,

therefore, did not constitute a contract, although having all the forms and all the elements of a contract. If the constitution of a State permits the legislature to authorize a contract, and it does authorize it, and the contract is, in fact, made and rights are vested under it, and all the departments of the State government—legislative, executive, and judicial—through a long series of years, recognize its validity and the validity of like contracts on the same subject, it would be an entirely new and very dangerous application of the doctrine of "police power" to permit the State suddenly to reverse its course and destroy the creatures of its own policy. "The law-maker cannot change his mind to the prejudice of vested rights" is a wholesome maxim of universal application in this country.

The legislative acts granting a lottery privilege to the city of Frankfort and authorizing its sale and transfer were not void; they were both valid as long as they remained in force, and all acts done and contracts made in pursuance of their provisions, while they were in force, are just as lawful and binding now as they were before the repeal of the statutes; and this is true even if the language used in the repealing act and the constitutional provision shall be so construed as to include the contract as well as the grant in the repeal and revocation. If it shall be said that, although the grant was not void, it was revocable at the pleasure of the legislature, and, therefore, the purchaser from the original grantee and all claiming under him took only a revocable privilege, our answer is, that this is the precise question which the court of appeals of Kentucky has decided again and again, as we have shown in this argument. It is the identical question which had been repeatedly decided before the plaintiff in error made

the purchase, and these decisions, according to well-settled principles of law, constituted a part of his contract.

A gratuitous grant of a lottery privilege does not constitute a contract between the State and the grantee, but, where the State authorizes the grantee to sell and transfer the privilege, and he does sell it, the purchaser becomes at once invested with a right of property which cannot be taken away from him without his consent or without making just compensation. By authorizing a sale of the privilege, the State necessarily makes it property in the hands of the purchaser, for it is a palpable contradiction in terms to say that a thing may be legally sold and transferred and to assert, at the same time, that the sale shall not constitute a valid contract or invest the purchaser with title to the thing sold. The reasons which support the authority of the legislature to repeal the original grant, while still in the hands of the grantee, have no application whatever in a case where the privilege has been sold to a third party under legislative authority, and no decision has been found in which the rights of such a party have been disregarded. In the present case, the purchaser claims no contract with the State itself, but his right to protection is founded upon the facts that the State, in the exercise of its sovereign power, has authorized another party to make a contract with him, and that, relying upon the statute and its uniform interpretation by the courts, he has, in good faith, invested his means and incurred obligations on account of the business in which the law invited him to engage for the benefit of the public.

The fundamental question in this case is, whether there was a valid contract in existence at the time of the passage

of the repealing act in 1890 and at the time of the adoption of the constitutional provision in 1891, for, if there was such a contract, the duty of the court to protect it against destruction or impairment by legislation or by judicial construction, is plain and imperative. That there was such a contract, made in good faith by parties competent to enter into it, is conclusively shown, we think, by the acts of the legislature heretofore cited, by the express recognition of the executive and ministerial authorities of the State, and by the repeated and uniform decisions of all its courts, during a long series of years. In addition to these general grounds, which would be more than sufficient to sustain our contention in any ordinary case, the validity of the identical grant and contract upon which the plaintiff in error relies has been judicially declared in a proceeding instituted by the defendant in error in its own courts against his vendor for the express purpose of preventing the use of this franchise. While we do not believe the act of 1890 or the constitutional provision of 1891 should be so construed as to repeal or annul anything except the grant itself, leaving all contracts lawfully made unaffected, yet, if a different construction is to be given them, or either of them, we insist that the doctrines of *stare decisis* and *res adjudicata* are conclusive of this case, and that the contract under which the plaintiff in error claims must be recognized and protected.

Whether the contract was one which the State ought to have authorized is not a question for the consideration of the Court. If the legislature had the constitutional power to authorize it, and did authorize it, and the judicial and other authorities of the State have sustained it, the question of its validity ought not to be open to further discus-

sion. As said by this Court in *Insurance Co. vs. Deholt*, 16 How., 428, quoted and approved in *Butchers' Union vs. Crescent City Co.*, 111 U. S., 746, "it can never be maintained in any tribunal in this country that the people of a State, in the exercise of the power of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions."

We respectfully submit, that the motion to dismiss or affirm as a delay case ought to be overruled, and that the judgment of the court of appeals ought to be reversed.

J. G. Carlisle.

D. W. Sanders,

Aaron Kohn,

For Plaintiff in Error.

APPENDIX.

Judge Pryor, delivering the opinion of the court of appeals, said:

"This character of legislation has been indulged in since the foundation of the State constitution and has met the approval of every department of the State government, and it is now too late to question the exercise of such a power."
Commonwealth *vs.* Whipps, 80 Ky., 277.

The schemes in this lottery are devised and the drawings are conducted according to the "combination and permutation" principle, commonly called the ternary system, which was invented by Joseph Vannini and for which the United States granted him letters patent under the acts passed by Congress "to promote the progress of science and the useful arts." (See Vannini *et al. vs.* Paine, 1 Harrington, (Del.), 65.)

ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY AUTHORIZING LOTTERIES.

"An act authorizing William Littell to have access to the enrolled bills in the office of the secretary of state and for other purposes," approved January 8, 1814. (5 Littell's Laws, p. 75).

Section 2 of the act provides:

"That as soon as the said collection shall have been completed, and so certified by the said Littell, that the edition of the statute law compiled by said Littell, including the fourth volume, lately printed, shall be received in all courts in this Commonwealth, as equal in authority to any printed copies of said laws heretofore in use in this Commonwealth."

Acts in 1st Volume Littell's Laws.

"An act authorizing a lottery," approved December 15, 1792 (1 Littell's Laws, p. 169). This act authorized the

raising of $500 to purchase a lot of ground and erect a church for the Lexington Dutch Presbyterian congregation. (See p. 234.)

"An act authorizing the trustees of Salem Academy to raise a sum of money by lottery," approved December 20, 1792. (1 Littell's Laws, p. 171.)

(Examine act December 19, 1795, p. 327, 1 Littell's Laws.)

"An act authorizing a lottery," approved December 8, 1795 (1 Littell's Laws, p. 359), "for the benefit of the Lexington Lodge of Ancient Masons." (Also see p. 557, Littell's Laws.)

"An act authorizing a lottery" (approved February 27, 1797, 1 Littell's Laws, p. 694), "to raise $1,000 to drain a pond contiguous to Versailles."

2d Littell's Laws.

"An act concerning a lottery in the town of Danville," approved February 3, 1798 (2 Littell's Laws, p. 169), to raise $2,500 by lottery, for the purpose of erecting a school-house and other buildings.

"An act authorizing a lottery in Clarke county," approved February 7, 1798 (2 Littell's Laws, p. 181), for the purpose of erecting a house for a grammar school. All clerks, drawers, and examiners were required to be on oath and a justice of Clarke county was to attend the drawing to see that it was conducted fairly and without fraud.

"An act authorizing a lottery in Bardstown, to raise $2,000 for erecting a house for Salem Academy. All clerks, drawers, and examiners were required to be on oath and a justice of Nelson county to attend the drawings," approved February 7, 1795. (2 Littell's Laws, p. 181.)

"An act to authorize the trustees of Jefferson Seminary to raise a sum of money by lottery," approved December 17, 1798. (2 Littell's Laws, p. 208.)

"An act authorizing a lottery for opening the navigation of the South and Stoner's Fork of Licking," approved December 18, 1798. (2 Littell's Laws, p. 210. See 1 Littell's Laws, pp. 193 and 343.)

"An act to establish and endow certain academies," approved December 22, 1798 (2 Littell's Laws, p. 245), by 2d section thereof authorizes the trustees to raise money by lottery to erect buildings.

"An act to appoint commissioners to settle the account of the managers and trustees of the Lexington Chances of Insurances," approved December 20, 1800. (2 Littell's Laws, p. 427.)

"An act authorizing a lottery in the town of Millersburg," approved December 2, 1801, to promote the lead works. (2 Littell's Laws, p. 491.)

3d Littell's Laws.

"An act repealing Millersburg lottery." (3 Littell's Laws, p. 98.)

N. B.—Chief Justice George Winter was pensioned for life by a general act. (3 Littell's Laws, p. 363.)

"An act authorizing a lottery for the benefit of the Lexington Medical Society," approved December 17, 1803. (3 Littell's Laws, p. 159.)

"An act to incorporate the Ohio Canal Company," approved December 19, 1804 (3 Littell's Laws, p. 232), by section 20 authorizes a lottery, and by section 21 directs execution of bond to the State of Kentucky, and section 22 requires the directors to qualify before a justice of the peace. By an act amending the act incorporating the Ohio Canal Company, approved December 20, 1805, by section 17 the United States and the States of Pennsylvania, Virginia, Maryland, Ohio, and New York were authorized to subscribe for shares of the capital stock in this corporation, not to exceed the amounts therein named, and by section 24 the

corporation was authorized to propose any scheme or schemes of a lottery, &c. (3 Littell's Laws, p. 270.)

4th Littell's Laws.

"An act authorizing a lottery for the improvement of the navigation of the Kentucky river," approved January 10, 1811 (4 Littell's Laws, p. 210; supplemental act thereto, approved January 26, 1811, 4 Littell's Laws, p. 243; amendatory act thereto, approved January 1, 1812, 4 Littell's Laws, p. 318); and by a subsequent act the time for drawing lottery was extended January 8, 1816. (5 Littell's Laws, p. 12.)

"An act further to promote the navigation of Salt river and its navigable branches," approved January 29, 1811. (4 Littell's Laws, p. 249.)

"An act authorizing a lottery to improve the Limestone road from Maysville to the south end of Washington, in Mason county," approved December 31, 1811. (4 Littell's Laws, p. 279.)

"An act concerning the Lexington Library Company, to raise by lottery, in one or more classes, any sum of money not exceeding $3,000."

"An act authorizing a lottery for the building of a bridge over South fork of Licking, in Harrison county," approved January 31, 1811. (4 Littell's Laws, p. 282.)

5th Littell's Laws.

"An act for the benefit of the Grand Lodge of Kentucky," approved January 27, 1815 (5 Littell's Laws, p. 181). This act authorizes the Grand Lodge to operate a lottery for its benefit or to sell one or more classes, &c.

"An act allowing further time for improving the navigation of Kentucky river," approved January 8, 1813. The time in which to operate the lottery was extended to January 8, 1816. (5 Littell's Laws, p. 12.)

"An act concerning the seminary of Warren county and authorizing a lottery for the benefit of said institution," approved February 1, 1813. (5 Littell's Laws, p. 46.)

"An act to amend the laws establishing the Bourbon and Lebanon Academies," approved January 29, 1816 (5 Littell's Laws, pp. 322 and 323). By section 4 of this act a lottery is authorized to be operated for the benefit of the Bourbon Academy.

"An act for the benefit of the Russellville and Columbia Lodges," approved January 29, 1816 (5 Littell's Laws, p. 224). This act authorizes lotteries for the benefit of both lodges.

Georgetown was authorized to raise money by way of a lottery to purchase a fire-engine by "An act to increase the power of the trustees of the town of Georgetown, and for other purposes," approved February 10, 1816. (5 Littell's Laws, p. 400.)

"An act to prevent imposition by way of lottery in this Commonwealth," approved January 29, 1816. (5 Littell's Laws, p. 317).

"An act to amend the laws regulating the towns of Millersburg, Paris, and Bardstown, and for other purposes," approved February 4, 1817, by the 5th section thereof authorizes lotteries. (5 Littell's Laws, p. 570.)

"An act authorizing lotteries for purposes therein named," approved January 31, 1816 (5 Littell's Laws, p. 232), which authorizes lotteries for paving the streets of Danville, Richmond, Greensburg, Bardstown, and Cynthiana and for finishing the seminary at Shelbyville.

Session Acts of 1818.

An act authorizing certain lotteries, approved January 28, 1818. (Session Acts 1818, page 332.)

This act authorizes a lottery in one or more classes in Hopkinsville.

By the 3d section it authorizes the building of a church in Scott county by the operation of a lottery in one or more classes.

By the 5th section it authorizes the town of Richmond to draw a lottery in one or more classes and with the proceeds pave the streets of that town.

By the 7th section it authorizes the drawing of a lottery in one or more classes in the city of Louisville for the purpose of building a hospital.

By the 10th section it authorizes the trustees therein named to conduct a lottery in one or more classes in the town of Maysville and with the proceeds arising therefrom to build a bridge over Limestone creek.

By the 11th section it authorizes the commissioners therein named to draw a lottery in one or more classes for the purpose of paving the streets in the town of Paris.

By the 13th section it authorizes the commissioners therein named to raise by way of lottery in one or more classes a sum of money to purchase two acres of ground and to erect the necessary building for a public school thereon.

By the 17th section it authorizes the commissioners therein named to draw a lottery in one or more classes, and with the proceeds derived therefrom to improve the streets in the town of Winchester.

By the 19th section it authorizes the commissioners named therein to raise by way of lottery in one or more classes a given sum of money to improve the public square and the cross-streets in the town of Lancaster.

By the 21st section it authorizes the trustees of the Nicholas Seminary to raise by way of lottery in one or more classes a given sum of money for the completion of their school building, and also for the purpose of providing books, school apparatus, &c.

By the 26th section the commissioners therein named are authorized to raise a given sum of money by drawing a

lottery in one or more classes to build a school-house in the town of Barbourville.

By the 25th section the trustees of the Henderson Academy are authorized to raise by way of lottery in one or more classes a given sum of money, which, at their discretion, may be invested in bank stock or otherwise for the use and benefit of said academy.

By the 30th section the trustees of the Shelby Academy are authorized to raise by way of lottery in one or more classes a given sum of money for the use and benefit of said academy.

By the 31st section the trustees of the Newport Academy are authorized to raise a given sum of money by way of lottery in one or more classes, and which, when raised, shall be applied to the use of said academy as the trustees deem proper.

By the 32d section the trustees of the Woodford Academy are authorized to raise by way of lottery in one or more classes a given sum for the use of said academy as the trustees thereof shall direct.

By the 33d section the trustees of the Harrodsburg Academy are authorized to raise by lottery in one or more classes a given sum of money to be applied to the use of said academy as the trustees thereof shall direct.

By the 35th section the commissioners therein named are authorized to raise by way of a lottery in one or more classes a given sum of money for the improvement of streets in the town of Falmouth.

By the 36th section the commissioners therein named are authorized to raise by way of lottery in one or more classes a given sum of money, one-half of which is to be applied by the trustees of the town of Glasgow in draining the ponds and improving the streets in said town and the balance to be paid over to the trustees of Glasgow Seminary for its use and benefit.

By the 37th section the trustees of the Boone Academy

are authorized to raise by way of lottery in one or more classes a given sum of money to be applied to the use and benefit of said academy as the trustees thereof shall direct.

By the 38th section the trustees of the Hardin Academy are authorized to raise by way of lottery in one or more classes a given sum of money to be applied to the use of said academy as the trustees thereof shall direct.

An act authorizing a lottery in the town of Hardinsburg, approved January 30, 1818 (Session Acts of 1818, p. 416), authorizes the persons therein named within five years to raise by way of lottery in one or more classes a given sum of money to be expended in building a seminary in the town of Hardinsburg, in Breckenridge county.

An act authorizing lotteries in Nicholasville and Lexington, approved February 4, 1818 (Session Acts of 1818, p. 556), authorizes the persons therein named to raise by way of lottery in one or more classes a given sum of money to be applied in paving the streets of Nicholasville, in Jessamine county, and by the 3d section of this act the persons therein named are authorized to raise by way of lottery in one or more classes a given sum of money to be applied to the benefit and use of the Lexington Athenæum.

Session Acts of 1820.

An act supplemental to an act entitled "An act for the benefit of the Grand Lodge of Kentucky," approved November 27, 1820 (Session Acts of 1820, p. 52), authorizes the managers therein named to raise by way of lottery in one or more classes a given sum to be appropriated for erecting and furnishing the Grand Masonic Lodge for the benefit of the Grand Lodge of Kentucky.

Session Acts of 1822.

An act authorizing a lottery for the benefit of the Lexington Light Artillery Company, approved November 15, 1822

(Session Acts of 1822, p. 50), authorizes the persons therein named to raise by way of lottery a given sum of money to pay the indebtedness of the Lexington Light Artillery.

An act authorizing a lottery for the benefit of Paris Union Lodge, No. 16, and for other purposes, approved December 2, 1822 (Session Acts of 1822, p. 90), authorizes Robert Trimble and his associates to raise by way of lottery in one or more classes a given sum of money to be appropriated in the erection of a Masonic hall in the town of Paris for the use and benefit of Paris Union Lodge, No. 16.

By the 5th section of this act the persons therein named are authorized to raise by lottery in one or more classes a given sum of money to be appropriated for the purpose of erecting a Masonic hall in the town of Mt. Sterling for the use of said lodge.

By the 9th section of this act the persons therein named are authorized to raise by lottery in one or more classes a given sum of money for the purpose of opening and improving the road from Olympian Springs to Beaver Creek iron works, in Bath county.

By the 11th section of this act the persons therein named are authorized to raise a given sum of money for Franklin Lodge, No. 28, and Warren Lodge, No. 53, for the purpose of purchasing a lot or lots of ground, not exceeding two acres each, and erecting thereon suitable buildings for the benefit of said lodges.

An act authorizing a lottery for the purpose of erecting a house in Lexington for the use of the Medical School, approved December 7, 1822 (Session Acts of 1822, p. 149), authorizes the persons therein named to raise by way of lottery in one or more classes a given sum of money to be appropriated in the erection of a medical college in the town of Lexington for the use and benefit of the professors of the Medical Department of the Transylvania University.

An act to authorize a lottery for the purpose of draining the ponds in the town of Louisville and adjoining thereto,

approved December 7, 1822 (Session Acts of 1822, p. 181), authorizes the persons therein named to raise by way of lottery in one or more classes a given sum of money to be expended in draining and causing to be drained all the ponds of stagnant water in the town of Louisville and for the draining of all those ponds of stagnant water which are situated between Louisville and the river on the west and between Louisville and the mouth of Salt river on the southwest, &c.

Session Acts of 1824.

An act to amend an act authorizing a lottery for opening a road from Beaver Creek iron works to Prestonburg, and for other purposes.

By the 1st and 2d sections of this act the persons therein named are authorized to conduct a lottery in one or more classes and raise a sum of money authorized under the act of 1822, and the money to be applied to the construction of the Beaver Creek Iron Works road, to open the road from Beaver Creek iron works, in Bath county, to Prestonburg, in Floyd county.

By sections 3, 4, 5, and 6 the persons therein named are authorized to conduct a lottery in one or more classes and to pay the proceeds of money arising therefrom to the treasurer of Christian county.

Session Acts of 1828.

An act more effectually to guard the right of suffrage, and for other purposes, approved February 13, 1828 (Session Acts of 1828, p. 194). By the 7th section of this act any and all persons are forbidden to sell lottery tickets in this State, in any lottery drawn outside of the State, under the penalty of one thousand dollars for every such offense.

This penal section was to protect tickets sold and offered for sale in the many lotteries authorized by the General Assembly of Kentucky.

Session Acts of 1834.

An act for the benefit of the Grand Lodge of Kentucky, approved February 7, 1834 (Session Acts of 1834, p. 414). This act is for the benefit of the Grand Lodge of Kentucky in the operation of a lottery theretofore granted by the General Assembly of Kentucky.

Session Acts of 1836.

An act concerning the Grand Lodge of Kentucky, approved February 29, 1836 (Session Acts of 1836, p. 588). This act authorizes the Grand Lodge of Kentucky or the managers heretofore appointed or which they may from time to time appoint to sell or dispose of the whole scheme of said lottery or any part or class thereof upon such terms as may be agreed upon by said Grand Lodge or her managers.

Session Acts of 1837.

An act for the benefit of Shelby College, approved February 16, 1837. (Session Acts of 1837, pp. 219–220.)

This act authorizes the managers therein named to raise by way of lottery in one or more classes an amount, not exceeding the sum of one hundred thousand dollars, to be appropriated for the use and benefit of Shelby College. By the 3d section of this act the managers are authorized to sell and dispose of the whole scheme or any class or classes of said lottery to any person or persons who will enter into a bond, with good security, conditioned well and faithfully to comply with all the terms and conditions of this act, payable to the Commonwealth of Kentucky, &c.

Session Acts of 1838.

An act for the benefit of the city school of the town of Frankfort, and for other purposes, approved February 1, 1838. (Session Acts of 1838, pp. 126–128.)

"Whereas, it is represented to the present General Assembly, that it is the desire and intention of a number of individuals to establish a public school suited to the wants and conditions of all classes of the community in the town of Frankfort: and, whereas, the Franklin Seminary has been pulled down and removed from the public square, thereby depriving the citizens of the only house of public instruction in said town, as well as the entire loss of the proceeds of six thousand acres of land, granted by the legislature to the county of Franklin, for seminary purposes: and, whereas, it is a matter of great importance to the public, that the town of Frankfort should be well supplied with water, as well for private as for public uses, and it is represented to the General Assembly that the same can be done by conveying it from Cold spring, in the neighborhood of said town: and, that the security of the private and public buildings thereof would be greatly protected."

This act authorizes the town to raise $100,000 by lottery for the benefit of the schools and to procure water.

Session Acts of 1839.

"An act authorizing a fund to be raised by lottery for the endowment of a male and female academy in the town of Paducah, and for other purposes," approved February 8, 1839. (Acts of General Assembly of 1839, pp. 139, 140.)

This act was amended by an act entitled "An act for the benefit of the male and female academies of the town (now city) of Paducah," approved February 9, 1866. (Acts of General Assembly of 1866, p. 397.)

Acts of 1839.

An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes, approved February 16, 1839.

By the 26th section of this act (page 191, Session Acts of 1839) it is provided as follows:

"The 4th section of an act entitled, 'An act for the benefit of the city school in the town of Frankfort and for other purposes,' approved February 1, 1838, is hereby repealed, and it is hereby further enacted, that the managers referred to in said act, or their successors, shall be, and are hereby, authorized to sell and dispose of the scheme, or any class or classes of the lottery referred to in said act, to any person or persons who shall enter into bond, with good security, to the Commonwealth of Kentucky, well and faithfully to comply with all the terms and provisions of said act thus amended, which bond shall be received by said managers, and be, by them, filed in the clerk's office of the Franklin county court, before said lottery, or any classes thereof shall be drawn; and if said bond and security is approved, and declared to be sufficient by the said county court, and also, by the board of trustees of the town of Frankfort, then, and in such case, the managers shall not be individually responsible for any prize or prizes that may be drawn."

Session Acts of 1841.

"An act to incorporate the Grand Lodge of Kentucky," approved January 29, 1841. (Session Acts of 1841, pp. 156 and 157.)

By the 5th section of this act the Grand Lodge is authorized to divert any portion it may deem right of the money which it is authorized by law to raise for the erection of its Grand Lodge for the purpose of purchasing the necessary site for an asylum and putting the same into operation, &c.

Session Acts of 1849.

An act to amend the laws relating to the town of Frankfort, approved February 21, 1849. (Session Acts of 1849, pp. 215–217.)

By the 1st section of this act the act entitled "An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes," approved February 16, 1839, is amended as follows:

"1st. The said town of Frankfort shall hereafter be known as the city of Frankfort.

"2d. The certain trustees authorized by said act to be elected annually, shall hereafter be called and known as councilmen, &c.

"3d. The chairman of the board of trustees shall hereafter be known as mayor of the city of Frankfort."

Session Acts of 1850.

"An act for the benefit of Henry Academy and Henry Female College," approved December 9, 1850. (Session Acts of 1850, p. 33.)

By the preamble of this act it is stated that the trustees of Henry Academy and Henry Female College are now making application to this legislature to grant them jointly the privilege of a lottery, by which they hope to realize a sufficient amount of money to finish and furnish the school-houses and properly improve and cultivate the grounds and furnish the schools with suitable apparatus, libraries, &c.

By the 1st section of the act J. N. Webb, Thomas B. Posey, Joseph Drain, William Pryor, and C. M. Matthews are authorized to raise, by way of a lottery in one or more classes, the sum of fifty thousand dollars.

By the 3d section of this act the said managers are authorized to sell and dispose of the lottery scheme or any class or classes thereof to any person who shall enter into

bond, with good security, conditioned well and faithfully to comply with all the terms and conditions of the act, payable to the Commonwealth of Kentucky, &c.

Acts of 1861,

Passed at the called session, which was begun and held in the city of Frankfort on Monday, the 6th day of May, 1861, and ended on Friday, the 24th day of May, 1861.

An act in relation to the town of Frankfort, approved May 21, 1861 (Session Acts of 1861, p. 33):

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SEC. 1. That so much of the 26th section of an act entitled 'An act to reduce into one the several acts in relation to the town of Frankfort, and for other purposes,' approved February 16th, 1839, as have been repealed by any subsequent act or acts of the General Assembly of this Commonwealth, shall be, and the same is hereby, re-enacted, and all subsequent acts repealing the same, are hereby repealed.

"SEC. 2. This act shall take effect from its passage."

Session Acts of 1865–'6.

"An act to incorporate the Southern Mining, Manufacturing and Trading Company," approved February 8, 1866. (Session Acts of 1865–'6, p. 386.)

Session Acts of 1867–'8.

"An act for the benefit of Wm. McClaire, of Henderson, county," approved February 5, 1868. (Session Acts of 1867–'8, vol. I, p. 434.)

Session Acts of 1867–'8.

"The act amending the charter," approved February 20, 1868 (Session Acts of 1867–'8, vol. I, p. 604). The 2d section confers a lottery grant, and was so construed by the Jefferson circuit court in 1879.

In this amendatory act the name of the corporation was changed to that of the "Kentucky Law Company."

There is an additional amendment to the charter, which enlarges the lottery grant, which was approved February 20, 1874. (Session Acts of 1873–'4.)

Session Acts of 1871.

"An act incorporating public library." (Vol. II, Acts of 1871, p. 499.)

Session Acts of 1872.

An act amendatory of the laws in relation to the city of Frankfort, approved March 28, 1872. (Session Acts of 1871–'2, vol. II, p. 393.)

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"SEC. 1. That the board of councilmen of the city of Frankfort be, and they are hereby, authorized and empowered to grant, bargain, sell and convey, to rent or lease, any and all property, or any part thereof, belonging to said city of Frankfort, be the same lands, tenements, goods, chattels, or franchises, or immunities, on such terms, and for such sums, and at such times, as said board of councilmen shall deem for the best interests of the said city of Frankfort.

"SEC. 2. This act repeals all laws or parts of laws in conflict therewith, and shall have full force and effect from and after its passage."

Session Acts of 1876.

Resolution in regard to lottery, approved March 9, 1876 (Acts of 1876, vol. I, pp. 158–'9):

"Whereas, on the 21st day of January, 1874, the attorney general of this State, in response to a resolution of the senate, reported that certain lottery privileges had expired:

Now, therefore, be it resolved by the General Assembly of the Commonwealth of Kentucky:

That the attorney general of the State be, and he is hereby, directed to institute proceedings in the Franklin circuit court against such persons or companies or associations as hold or exercise or claim such privileges, as well as for any other lottery privileges which have expired, to have the same declared to be expired and no longer of any force or effect, and to cause to be punished by proper proceedings in the proper court.

Therefore, be it resolved, That the attorney general of this Commonwealth be requested to furnish this General Assembly at his earliest convenience with such information as he may have in regard to the lotteries of this Commonwealth, showing—

First. The number of lottery grants or charters that have been granted by the legislature of Kentucky since 1870 that now claim to act by authority of law.

Second. When were these grants or charters passed by the legislature under which these called the Paducah lottery and the Frankfort lottery or any other lottery claim to act, being operated within this Commonwealth?

Third. What were the terms and conditions upon which the legislature made the grants, franchises, &c., to the incorporations therein named or designated?

Fourth. How long have these grants, franchises, and privileges to run before they will expire or exhaust themselves by the terms of the grants therein contained?

Fifth. To state what legislation in his opinion is necessary to require said lottery companies to report to the governor of this Commonwealth annually, showing their operations under said grants, whether the same are exhausted, and if not exhausted, when they will terminate and expire." Approved March 9, 1876.

Session Acts of 1877–'78.

"An act to incorporate the Newport Printing and Newspaper Company," approved April 9, 1878. (Acts of 1877–'78.)

Session Acts of 1880.

"An act for the benefit of W. C. D. Whipps," approved April 27, 1880. (See opinion, 80 Ky., 270.)

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

No. 316.

J. J. DOUGLASS, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR THE DEFENDANT IN ERROR.

W. S. TAYLOR,
Attorney-General for Kentucky.

LEWIS N. DEMBITZ,
Of Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 319.

J. J. DOUGLASS, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR THE DEFENDANT IN ERROR.

May it please the Court:

There has seldom been a writ of error obtained from this court against the judgment of the highest court of a State with as little prospect of or ground for reversal as in the case now before your Honors; but the present law officer of Kentucky, who has come into office but a few short months ago, is not to blame for not having gotten rid of the writ of error by "motion to dismiss or affirm" more than two years ago.

The record is very short. It is true there are seventy-eight pages in the printed record; but of these thirty-seven pages are taken up with the opinion of the Court in which the action was first brought, and from which it went to the Court of Appeals of Kentucky, and most of the remaining matter with formal entries, certificates, citations, etc.

The only material parts of the printed transcript are:

1. The petition of the Commonwealth of Kentucky against the plaintiff in error and others, charging them with unlawfully claiming the franchise of conducting and drawing the Frankfort lottery, on pages of printed transcript, 1, 2, and 3.

2. The answer of J. J. Douglass, the plaintiff in error, on pages 4-12, and the exhibits filed with it, pages 13-26.

3. The opinion of the Court of Appeals of Kentucky, showing the Federal question which is involved.

4. The application for the writ of error, which seeks to state the Federal question in its various phases, pp. 73, 74.

The petition of the Commonwealth, which is in the nature of a writ of *quo warranto*, sets out that by an act of 1869 of the Legislature of Kentucky, entitled, "An act to amend and reduce into one the several acts in relation to the city of Frankfort," a lottery franchise was granted to that city; that by an act approved March 28, 1872, the Board of Councilmen of that city were authorized and empowered "to grant, bargain, sell and convey, to rent or lease, any and all property or any part thereof, belonging to the city of Frankfort, be the same lands, tenements, goods and chattels, or franchises or immunities;" that J. J. Douglass and two others, who are made defendants, derive title under this act from the Board of Councilmen of Frankfort, but that on the 22d of March, 1890, the clause of the act of 1869 granting the lottery franchise was expressly repealed, and that moreover in the new Constitution of Kentucky, coming into force in 1891, it is thus provided: "Lotteries and gift enterprises are forbidden and no privileges shall be granted for such purposes, and no schemes for such purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges in charters heretofore granted are revoked."

The answer of J. J. Douglass first sets out with more fullness the acts conferring the franchise, then it proceeds to trace title to him from the Council of that city, by a contract which requires the grantees, during the term of fifty-one years (i. e., 1876-1926) to pay certain sums therein named to that city for the benefit of its public schools. He then recites an act of May 17, 1886, which authorizes every corporation or person which has been found by the judgment of the Court of Appeals to have a lawful and subsisting lottery privilege, to conduct such lottery upon giving bond in a named penalty, and on paying certain license taxes; and a section in the Louisville tax law of 1884 directing that city to collect certain license taxes on lottery shops. He shows that the franchise claimed by him has been sustained as lawful and subsisting by a decision of the Court of Appeals rendered in 1878. The rest of the answer consists in setting up the further retention of the franchise against the repealing act of 1890, and against the revoking clause of the Constitution, as a contract right; claiming as well the benefit of a contract with the State, as the benefit of a contract with the city of Frankfort, neither of which the State can impair. Then follow the exhibits, the first and

most important of which is the contract with the city of Frankfort. This contains among other things the following clause (printed p. 18, original page 35):

"Provided however and it is expressly understood that nothing herein contained shall be construed as a guarantee on the part of the parties of the first part of the validity of the lottery grant herein referred to, or as to their power to dispose of said scheme and classes."

The Louisville Law and Equity Court, in which the *quo warranto* proceeding was first instituted, overruled a demurrer to this answer and the Commonwealth standing by its demurrer, the petition was dismissed, and the writ denied. The Commonwealth appealed, and on the 16th of December, 1893, the Court reversed the judgment of the court below, and remanded the cause "for proceedings in conformity with the opinion herein." The opinion declares that the Commonwealth had the authority to revoke the charter, and that it has been revoked. Whether it was proper to take a writ of error from this judgment of the Court of Appeals without waiting for a decision in the court below upon the mandate may be doubted, but we do not raise the point. We are quite willing to let this Court pass upon the merits as raised by plaintiff in error in his application, which was granted by one of the judges of the Kentucky Court of Appeals.

In fact, the case at bar differs in substance, if not in form, from Bostwick v. Brinkerhoff, 106 U. S. 3, the leading case on this point. When the Court of Appeals of New York, in that case held that State courts have jurisdiction of an action of negligence against the directors of National banks, it left it of necessity to the lower court to go on with the inquiry whether the defendants before it were guilty of negligence. But when the Court of Appeals of Kentucky held that the repealing act of 1890 and the revoking clause in the Constitution of 1891 were valid, it left the defendant Douglass nothing to stand upon; for if this was so, neither he nor any one else could be the lawful owner of a lottery franchise in Kentucky. Hence the judgment of reversal was for all practical purpose a final judgment; the order for further proceedings was a mere thing of form.

We have looked into cases later than Bostwick v. Brinkerhoff, such as Johnson v. Keith, 117 U. S., 199, Rice v. Sanger, 144 U. S., 197, Meagher v. Minnesota Manufacturing Company, 145 U. S., 608; and in these cases as well as in the first-named, there was a motion to dismiss. We make no such motion here.

We also find Louisville Gas Company v. Citizens' Gas Light Company, 115 U. S. 683, where the mandate of the Court of Appeals of Kentucky, from which the writ of error was taken in this court, remanded the cause to the Louisville Chancery Court with instructions to enter a certain final judgment in favor of the appellant, and this court treated the judgment as final, and reversed it upon the merits. Now, as shown above, the mandate of reversal by the Court of Appeals in this case is in substance at least, if not in form, as direct and final as that in the Gas Company's case; it left just as little to be tried.

We firmly believe that the plaintiff in error in this case took the writ of error to this court with the purpose, and in the hope, that it would be dismissed on the point of the lack of finality; that a final determination of his rights would thus be staved off for two or three years more, and he might thus be enabled to carry on his nefarious calling to the injury of the community. Hence we trust, that if this Court can consistently waive this point, so as not to dismiss the cause *sua sponte*, for the lack of a final judgment in the highest Kentucky court, that your Honors will take the cause up on its merits.

But if there must be a dismissal for want of jurisdiction, why not put it upon another ground, which will forever end this controversy? We firmly maintain that there is no Federal questions involved. There was a Federal question in the lottery cases from Alabama, Mississippi and Louisiana hereafter referred to, because the grant was made to an individual or to a private corporation. But in this case the grant was contained only in a city charter. It is a familiar principle, laid down by Dillon in his work on Muncipal Corporations, and so well known that it would be idle to quote authorities to this Court, that a municipal charter is not a contract; that cities and towns are only sub-divisions of the State government, liable to be changed at any time in the discretion of the Legislature. If the Federal question can be raised in this case, because the State of Kentucky chose to change one section in the charter of the city of Frankfort, a Federal question can be raised in every case of a charter amendment; and as our city charters are continually being changed and overhauled, almost every case growing out of municipal matters will be liable to be brought by writ of error from the highest State court to this court, causing infinite delay in the administration of justice, and clogging the business of this court beyond endurance.

We are fortunate enough to find a case exactly in point; it is New Orleans v. New Orleans Water Works, 142 U. S. 79. We quote from the syllabus:

"Before this Court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it was impaired."

Again:

"A municipal corporation, being a mere agent of the State, stands in a governmental or public character, in no contract relation with the sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation; but such a corporation, in respect to private or proprietary rights and interests, may be entitled to constitutional protection."

This Court (with the dissent of only one of the justices) dismissed the cause for want of jurisdiction, on the ground that the legislative amendment of the city charter did not present a sufficient semblance to changing a contract, to raise the constitutional point.

Mr. Justice Brewer says in his opinion (p. 87):

"The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, *otherwise a Federal question might be set up in almost every case, and the jurisdiction of this Court invoked simply for the purpose of delay.*" He then quotes Millingar v. Hartupee, 6 Wall, 258.

The absurdity of calling a clause in a city charter, which gives to a city one means, among others, for raising revenue a contract; the still greater absurdity of giving this name to a law imposing a license tax, takes this writ of error outside of the requirement, stated by Mr. Justice Brewer, that there must be "some foundation" for the Federal question. But the last prop is taken away by the Kentucky act of February 14, 1856, reserving the right of legislative repeal, which precedes all the legislative acts relied on by the plaintiff in error; and which was enforced by this Court in Louisville Water Works v. Clark, 143 U. S. 1, and is again referred to hereafter. This act takes the case at bar clearly beyond the limitation above quoted from the New Orleans case, that there must have been "a legal contract subject to impairment."

Your Honors have, therefore, if they prefer to dismiss the writ of error of their own motion rather than to affirm the

judgment below, the best reason to do so upon the ground that no Federal question is involved.

By doing so your Honors will set the whole matter at rest, and save yourselves from being troubled by this controversy again, when final judgment shall have been entered in the lower Kentucky Court under the mandate of the Court of Appeals.

Should your Honors conclude to decide the matter upon its merits, we have the following further arguments to offer, part of which may also be considered on the proposition to dismiss for want of a Federal question.

The important part of the opinion of the Court of Appeals is found at the bottom of page 70 of the printed record, and reads thus:

"The famous Dartmouth College case, and others that have followed it, are invoked to sustain this position. But the Supreme Court of the United States in Stone v. Mississippi, 101 U. S., 814, in construing the provisions of the Federal Constitution which declares that the States shall pass no law impairing the obligation of contracts, held that the inhibition related to 'property rights' and not to matters that were 'governmental.' The Court there held in strong and emphatic language that lotteries, being a species of gambling, were vicious and demoralizing to the community, and that as it was the trust and duty of the State government to protect and promote the public health and morals, it could not sell, barter or give away that duty, etc."

The opinion then proceeds on this line, and the point here touched upon is the only one which raises a Federal question which is simply:

Was there a binding contract made by any one, with or in favor of the plaintiff in error, which the Commonwealth of Kentucky "impaired" by the repealing act of 1890, or by the lottery clause of the Constitution of 1891?

First—Was such a contract made by the Commonwealth?

Second—If there was such a contract between the city of Frankfort and the plaintiff in error, or his grantors, did the State action of 1890 and 1891 impair the obligation of this contract?

First—There was not, and could not be, a contract between the Commonwealth and any one, giving him the right of conducting a lottery for a definite or an indefinite time, beyond the power of revocation. There could not be, as held in Stone

v. Mississippi, quoted in the opinion cited above; and the decision there rendered was foreshadowed in the preceding case of Boyd v. Alabama, 94 U. S., 645, and is affirmed in the subsequent case of New Orleans v. Houston, 119 U. S., 265, 274. This is a doctrine from which this Court will never recede.

Moreover, there was not in fact either a contract, or even the appearance of a contract. The franchise was originally granted to a municipal corporation, as a part of its means to raise revenue for the benefit of its public schools. There is no precedent in the decisions of this Court of any city or town charter ever being brought within the rule of the Dartmouth College case. Hence, the act of 1869, granting the franchise, did not on its face imply any promise on behalf of the Commonwealth to abstain from repeal for one legislative session, or even for a single day. The act of 1872 authorizes the city of Frankfort, through its council, to sell its franchises. Under it the city can sell no greater rights than it owns.

The acts of 1884 and 1886 imposing a license tax on lottery shops, and a license fee, along with the duty of giving bond on the head office, are as open to repeal as any other tax laws. It would be an insult to this Court to quote authorities on this proposition.

But there is another reason why the acts of 1869 and of 1872 are not contracts, even on their face. On the 14th of February, 1856, the Legislature of Kentucky passed an act to the following effect:

"All charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed; *Provided*, that while privileges or franchises so granted may be changed or repealed, no amendment shall impair other rights, previously vested."

This act was passed upon, and enforced by this Court in the case of the Louisville Water Co. v. Clark, 143 U. S., 1, a case certainly much more meritorious on the part of the appellant than the case at bar. (The plaintiff in error does not pretend to act under the act of 1838, but under one passed in 1869, giving like franchises as those which had been granted in 1838.)

Second—The repealing acts of 1890 do not impair any contract made by the city of Frankfort. The contract made by

the city is altogether executed. It conveys whatever franchise it has. It positively refuses to guarantee the validity or extent of the franchise. The city steps out once for all.

The position that the assignee of a franchise stands in a better light than the original grantee is fully met in the Water Company case just cited on page 17; the claim was there made on behalf of the mortgagees of the Water Company, that the repealing act diminishes their security.

The Court of Appeals, in the judgment appealed from, rely entirely on Stone v. Mississippi. Their attention was not drawn to the act of February 14, 1856, as it was not necessary to do so.

Otherwise, they would not have needed to excuse their departure from the Kentucky precedent of Gregory v. Trustees of Shelby College, 2 Met., 589, in which a lottery franchise was sustained against repeal to the extent to which third parties had advanced money on its faith; for the Shelby College grant had been made long before February 14, 1856.

A reversal of the judgment brought here by writ of error is wholly out of the question. Its affirmal, in preference to the dismissal of the writ, is earnestly requested.

Respectfully submitted,

W. S. TAYLOR,
Attorney-General for Kentucky.
LEWIS N. DEMBITZ,
Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 62

J. J. DOUGLASS, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

BRIEF ON MOTION TO DISMISS OR AFFIRM.

W. S. TAYLOR,
Attorney General for Kentucky.
WM. GOEBEL,
Of Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 319.

J. J. DOUGLASS, ... Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error,

BRIEF ON MOTION TO DISMISS OR AFFIRM.

May it please the Court:

This is a writ of error from the Court of Appeals of Kentucky, in the Frankfort lottery case.

This case would not have been passed last October except for the fact that counsel for the defendant in error was asked to do so until after the 4th of March, 1897, because at that time one of the lawyers for plaintiff in error was a member of the President's cabinet and asked that the case be passed until the expiration of his term of office, to-wit, the fourth of March, 1897, but since no agreement can now be reached as to the date of argument we feel that this motion should be made and the lottery first suppressed by an act of the Legislature and then by the new Constitution of Kentucky and condemned by its highest court finally suppressed.

ON THE MOTION TO DISMISS.

The judgment of the Court of Appeals of Kentucky reversing that of the Louisville Law and Equity Court, declared by reference to the opinion which leads up to it that James J. Douglass has not the right to conduct the so-called Frankfort lottery because its charter had been repealed by the Legislature, and because, moreover, the Constitution of 1891 had revoked all former lottery franchises and forbidden the granting of new ones. The writ of error was applied for, in form, on four grounds, but in reality, on one single ground, namely, that the State of Kentucky, in repealing the charter formerly enjoyed by Douglass, had passed a law impairing the obligation of contracts, and the highest court of the State had thus denied to the applicant a right claimed under the Constitution of the United States.

We might have asked a dismissal on the ground that the judgment appealed from is not final, as it remands the cause to the lower court with directions to proceed in conformity with the opinion. But, so far from asking a dismissal on this ground, we beg your Honors to pass by any irregularity on that score; we are even prepared to argue that the judgment was final within the authorities. It is said in United Mutual Insurance Co. v. Kirchoff, 160 U. S., 374, decided at this term, that the rule by which a judgment remanding to the lower court with directions to conform to the opinion is *well-nigh* universal; it is said further that the rule must apply at all events when the opinion is not in the record. It seems to follow that when the opinion is in the record, it may be such as to stamp the mandate of reversal with directions to conform to the opinion as final. The test of finality is this: That there can be no appeal from the judgment rendered by the lower court upon the mandate, because no judicial discretion is left to that court. If such is the case, there must be an appeal or writ of error from the mandate of reversal; otherwise, this remedy would fail altogether. This test brings us to the two cases of Stewart v. Salamon, in 94 and 97 U. S., which were invoked by the plaintiff in error in the case just quoted from 160 U. S., but which could not aid them, as their own case was very different. In Stewart and Salamon, there was first a judgment upon a demand and a credit; upon appeal this court fixed, in

a reversing opinion, both the demand and the credit, and sent the cause back for proceedings "in conformity to this opinion." The lower court rendered its judgment for the number of dollars debt, less the number of dollars allowed as credit by this court; and an appeal from this judgment was dismissed upon the ground that it was in reality the judgment of this court. In like manner, the mandate of the Court of Appeals of Kentucky, by referring to an opinion which declares the clause in the State Constitution, abolishing all old lottery franchises, and forbidding any new ones, valid, leaves absolutely nothing to the Law and Equity Court to decide. For the proceeding is in the nature of a *quo warranto*, and seeks nothing but a judgment declaring that Douglass has no lottery franchise. The mandate of reversal, which is before your Honors, leaves no room for discretion in the lower court. The latter must obey it by entering at once the declaration: "Douglass has not and can not have a lottery franchise." Just as in Stewart v. Salamon, the circuit court had to obey, and to enter a judgment for so many dollars and so many cents.

It will be asked, why do we, as defendants in error, argue against a ground of dismissal which seems so plausible? Plain enough! Because a dismissal for want of finality would leave matters for two or three years longer in the disgraceful condition in which they now are. The plaintiff in error would not be barred from suing out a new writ of error with supersedeas after the present writ is dismissed; and very probably during all the years that would be thus consumed the octopus would go on sucking in the life blood of the poor of four cities.

We ask a dismissal of the writ upon an entirely different ground, one that will make an end of this controversy, namely, that no Federal question is involved.

The pretended lottery franchise which the plaintiff in error sets up was contained in an act of the Legislature of Kentucky enacted in 1869, amending and revising the laws for the government of the city of Frankfort. By that section the city authorities were, by reference to an older town charter enacted in 1838, authorized to run a lottery for the benefit of the public schools of Frankfort. In 1872 the council was authorized to sell and alien any property or franchise of the city.

The repeal of the act of 1869 is assigned as a "law impairing the obligation of contracts." It is a familiar principle, laid down by Dillon in his Municipal Corporations, too well known to require authorities to be cited in this court, that a munici-

pal charter in this country is not a contract; that cities and towns are no more than subdivisions of the State government, liable to be blotted out at any time in the discretion of the Legislature. If the Federal question can be raised in this case, because the State of Kentucky has chosen to change one section in the organic law of the city of Frankfort, a Federal question can be raised in every case of a charter amendment; and as our city charters are continually changed and overhauled, almost every case growing out of municipal affairs might be brought here by writ of error from the State courts, causing infinite delay and clogging the business of this court beyond endurance.

We are fortunate enough to find a case exactly in point. It is New Orleans v. New Orleans Water Works, 142 U. S., 79. We quote from the syllabus:

"Before this court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it was impaired."

Again:

"A municipal corporation, being a mere agent of the State, stands in a governmental or public character, in no contract relation with the sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation; but such a corporation, in respect to private or proprietary rights and interests, may be entitled to constitutional protection."

This court (with the dissent of only one of the justices) dismissed the cause for want of jurisdiction, on the ground that the legislative amendment of the city charter did not present a sufficient semblance of impairing a contract, to raise the constitutional point.

Mr. Justice Brewer says in his opinion (p. 87):

"The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, *otherwise a Federal question might be set up in almost every case and the jurisdiction of this court invoked simply for the purpose of delay.*" He then quotes Millingar v. Hartupee, 6 Wall., 258.

The absurdity of calling a clause in a city charter, which gives to a city one means, among others, for raising revenue a contract; the still greater absurdity of giving this name to a law imposing a license tax, takes this writ of error outside of

the requirement stated by Mr. Justice Brewer, that there must be "some foundation" for the Federal question. But the last prop is taken away by the Kentucky act of February 14, 1856, reserving the right of legislative repeal, which precedes all the legislative acts relied on by the plaintiff in error; and which was enforced by this court in Louisville Water Works v. Clark, 143 U. S., 1, and is again referred to hereafter. This act takes the case at bar clearly beyond the limitation above quoted from the New Orleans case, that there must have been "a legal contract subject to impairment."

We also refer on this branch of the case to Winona Ry. Co. v. Plainview, 143 U. S., 371.

We therefore call upon your Honors to dismiss this cause for the want of a Federal question, and thus to rid yourselves from this attempt of greed, strutting in the guise of vested rights, to drag your august seat of justice and the sacred words of the National Constitution to its base purposes and to discourage like attempts in the future.

But if this can not be done, we must succeed on the second branch of our motion, which is

TO AFFIRM.

A rule promulgated on the 8th day of May, 1876, says:

"There may be united with a motion to dismiss a writ of error to a State court a motion to affirm on the ground that, although the record may show that the court has jurisdiction, it is manifest that the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

This rule was adopted two years earlier than another which gave the same right to move, "to dismiss or affirm" in cases coming up by writ of error or appeal from the United States Circuit Courts. It was so adopted, because the writs of error to State courts were so very often flimsy, and the constitutional or other Federal questions involved in them so very thin.

That the writ of error in this case is taken for delay is clear enough to any one who considers the heavy profits which a lottery, practically the only one left in the United States, gathers up by its daily drawings, and the futility of the supersedeas bond. For how can the Commonwealth of Kentucky

under this bond recover from the plaintiff in error and his associates one cent of the fabulous profits which they extract from its people while this writ of error is awaiting decision? The motives for delay are immeasurably greater than in the ordinary case of a judgment for the recovery of money, for the ond to stay such a judgment secures not only the body of the thing recovered, but also the fruits or interest.

That the question raised is "so frivolous as not to need further argument," means, under the decisions of this court in which the rule has been enforced, simply this: That the very point has been passed upon by this court deliberately and unanimously. We refer to Swope v. Leffingwell, 105 U. S., 3, where Chief Justice Waite said this and no more:

"We have jurisdiction of this case. The motion to dismiss is therefore denied; but as the only Federal question presented on the merits was decided by the court below in accordance with our rulings in National Bank v. Matthews and National Bank v. Whitney, the motion to affirm is granted." In at least fifteen cases the motion to affirm has since been granted upon like grounds.

In the case at bar the highest court in Kentucky decided the only would-be Federal question in accordance with the rulings of your Honors, in Stone v. Mississippi, 101 U. S., 814, rulings which were foreshadowed in Boyd v. Alabama, 94 U. S., 645, and which were approved in New Orleans v. Houston, 119 U. S., 265, 274. There is not the faintest prospect that your Honors will ever recede from the position there taken, that you will ever concede the power of a State to barter away its power and duty to watch over the public morals. The three cases were much stronger on the side of franchise than that at bar, for it had in each of them been granted to an individual or to a private corporate body, while in the case at bar the pretended franchise has been granted to a city. Hence the power of the Commonwealth to revoke the franchise "needs no further argument."

The other point against the binding force of the act of 1869 as a contract, namely, the preceding declaratory act passed by the Legislature of Kentucky on the 14th of February, 1856, was not mentioned in the opinion of the Court of Appeals of Kentucky as a ground for its judgment; but it has, as shown, above, been recognized by this court, and must be recognized again. The case of the Louisville Water Works against the Commonwealth of Kentucky must be well known to parties

and to counsel in this case, and they can not hope that it will be overlooked by the court. For this reason also, "the Federal question needs no further argument."

We hope that by a speedy dismissal for want of a Federal question, or by an affirmal under the rule of 1876, this court will put its stamp of disapproval on the disgraceful business which the people of Kentucky have for years been laboring to suppress, and that it will send the Frankfort lottery to the jungles of Honduras to seek the company of its sister from Louisiana or, for our part, to the North Pole.

Respectfully submitted,

WM. S. TAYLOR,
Attorney-General for Kentucky.

WM. GOEBEL,
Counsel for Defendants in Error.

neither Section 226 of the State Constitution abolishing all lotteries, nor the Act of 1890 repealing the Act of 1869, did affect plaintiff's right under said contract. On the other hand, it is contended for the State that no one can acquire a vested right in a lottery franchise that is not subject to repeal, and that the provision of the Constitution of the United States which provides that, "No State shall pass any *ex post facto* law, or any law impairing the obligation of a contract," does not protect or embrace contracts under lottery franchises; that the grant of the lottery privilege by the State was an exercise of its police, not its contractual power, which police power is inherently lodged in the State for the promotion and protection of its morals, welfare and happiness, which the State can not surrender and barter away either as a gratuity or for pay; and while the Legislature may in the exercise of its police power grant a lottery privilege, the grant is only a privilege or a license—only an indulgence—a suspension for the time being of the law against gambling and not a contractual right, and that any subsequent Legislature in the interest of good order and morals may revoke the license, and repeal the grant, although pecuniary interest may have been acquired under and by authority of the grant.

The Dartmouth College Case has been much relied upon by the plaintiff in error to uphold the validity of his contract. There is a very great difference as we contend between the principles involved in that case and of those in the one at bar. That case affected a private corporation organized for benevolent purpose and was not of a public nature. The case at bar is peculiarly public in its nature, invading the governmental functions of the State, and affecting the public morals. Justice Story in his opinion in that case says: "In my judgment it is perfectly clear that any act of a

Legislature which takes away any powers or franchises vested by its charter in a *private* corporation . . . is a violation of the obligations of that charter."

The principle announced in the Dartmouth College Case was never intended to be applied to public or *quasi* public corporations, or to legislative acts affecting the public interests, public morals and governmental powers of the State. The doctrine even as applied to rights acquired under charters affecting only private interests has been severely criticised. It has been insisted that the legislative power which granted could also annul; that the creature could not rise above the creator; and that the doctrine even as thus applied led to a multitude of evils. However, this may be, the doctrine therein expressed is too well established to be overthrown, nor do we contend that it should be. It is firmly imbedded in the jurisprudence of this country, and must be accepted as the law of the land. But it does not follow that this doctrine should be so extended as to render impotent the Legislature in its governmental powers when attempting to eliminate a public evil. The Court in deciding the Dartmouth College Case confined the doctrine of vested rights obtained under legislative grants to franchises of a private nature, but declared that the right to repeal in those cases exists where that right is reserved either by constitutional provisions, or by special or general enactment of the Legislature.

I.

The Frankfort Lottery Franchise is repealable, for the reason that the power to alter, amend or repeal was expressly reserved, because of the existence, at the time of the grant, of the provisions of the Act of 1856, which specifically reserved to the Legislature the power to repeal all subse-

quent acts, the provisions of said act bearing upon the question at issue are: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." (Chap. 68, Sec. 8, Page 862.)

II.

Independent of the Act of 1856, lottery grants being of a public nature are repealable and subject to legislative control.

The importance of recognizing the distinction between public and private corporations and excepting the former from the principle laid down in the Dartmouth College Case has become more and more apparent with the growth of corporations, and the wants and necessities of our civilization, and has been realized and emphasized by the best jurists of the land.

The great doctrine of the right of Legislatures to control charters of a public or *quasi* public nature, by altering, amending or repealing them, was early announced in this Court, in a leading case of Charles River Bridge Co. vs. Warren River Bridge Co., 11 Peters, 547.

The Charles River Bridge case is a light-house on a dangerous shore. That was a case where the appellant had accepted a franchise and expended large sums of money under it, and had paid and was bound to pay a large annuity to Harvard College, in consideration of the right to exact specific tolls. The Legislature of Massachusetts afterwards

by grant to the Warren River Bridge Co. undertook, in effect, to deprive the first named company of all tolls. Counsel for the appellant in that case relied upon the Dartmouth College Case. They insisted, as plaintiff in error does here, that their client had a vested right in its franchise, which was protected by the constitution. But the Court ruled otherwise, announcing the vital principle, that "in grants affecting the public nothing passes by implication," and holding, that in such cases the right to alter, amend or repeal the grant exists whether expressly reserved or not.

This principle, so vital to the public welfare, has ever since been recognized by this Court. It has often been applied to cases involving the public health and morals, and has generally been designated as the police power of the State. But, called by whatever name, it is one and the same power. It is simply the power of sovereignty. It is the power to govern men and things. In all matters affecting the public welfare, this power must needs be exercised regardless of previous grants, because it is the prime end of government to minister to the public good, and no Legislature has the power to barter away the general welfare. Behind Legislatures, back even of constitutional conventions, is this great Bill of Rights, this Magna Charta, of which the people can not rightfully be dispossessed.

So no man can have a vested right in a public nuisance; hence fencing laws, stock laws, quarantine, local option and usury laws have been upheld; and so the right to regulate the price of bread, the charges of tavern, railroads and warehouses have been sustained.

In the Warren River Bridge case supra, the Court said: "The object and the end of all government is to promote the happiness and prosperity of the community for which

it is established, and it can never be assumed that the government intended to diminish its powers for accomplishing the end for which it was created."

And in Boyd vs. Alabama, 94 U. S. 650, the Court said: "We are not prepared to admit that it is competent for one Legislature by any contract with an individual to restrain the power of a subsequent Legislature to legislate for the public welfare."

In the case of Butchers Union Company vs. Crescent City Company, 111 U. S. 750, the Court said:

"While we are not prepared to say that the Legislature can make valid contracts on no subjects embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it can not by contract limit the exercises of those powers to the prejudice of the general welfare. They are the public health and the public morals. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the suppression of crime."

In Fertilizing Co., vs. Hyde Park, 97 U. S. 666, the Court said: "Every reasonable doubt is to be resolved adversely. Silence is negation. Nothing is to be taken as conceded, but what is given in unmistakable terms, or by implication equally clear. This doctrine is vital to the public welfare, it is axiomatic in the jurisprudence of this Court." And so this Court has uniformly held, as we think, that in matters affecting the public, the right to alter, amend or repeal the grant exists by implication. See 128 U. S. 174; 108 U. S. 531; 94 U. S. 181; 132 U. S. 75; 106 U. S. 307. See also 10 How. 511; 13 How. 71; 1st. Wallace 116; 96 U. S. 63; 97 U. S. 697; 103 U. S. 1; 108 U. S. 506.

These cases decide that wherever the general welfare is

concerned, the right to alter, amend or repeal exists by implication, unless the right to so alter, amend or repeal has been expressly parted with. Indeed the Court has intimated time and again that this is a right that can not be abrogated, even if attempted; that it can not be bargained away even by express words. (11 Peters, 547; 108 U. S., 541; 94 U. S., 645; 118, U. S., 586.)

In 34th Federal Reporter, page 481, Justice Love says: "No government can rightly delegate to individuals or corporations its high duties, so far as to place them beyond its power of supervision and control." It is upon this basis that the decisions known as the Granger cases rest.

In those cases, the Court held that the Legislature could control the rates of warehouses and railroads by general laws, regardless of the rates allowed in the charters.

What is known as the Chicago Lake Front Case, decided December 5, 1892 (See Ill. Central R. R. Co. vs. Ill. Sup. Ct. Rep., Vol. 13, No. 5, Ill), applies the principles here contended for to an extreme case. In that case the State held the title to certain lands under navigable waters and for a valuable consideration granted them to the railroad company and afterwards repealed the grant. The Circuit Court sustained the repealing act, and, on appeal, the Supreme Court affirmed the case, holding that it is not within the legislative power of the State to abdicate such trusts, and that where one Legislature cedes such lands, another may repeal the act.

The Court says: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them under the use and control of private parties . . . . . than it can abdicate its police powers in the administration of government and the preservation of

the peace. In the administration of government the use of such powers may, for a limited period, be delegated to a municipality or other body, but there is always with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they can not be placed entirely beyond the direction and control of the State.

"The harbor of Chicago is of immense value to the people of the State of Illinois, in the facilities it affords to its vast and constantly increasing commerce, and the idea that its Legislature can deprive the State of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that can not be defended.

"The soil under navigable waters being held by the people of the State in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the State.

"In Newton vs. Commissioners, 100 U. S., 548, it appeared that by an act passed by the Legislature in Ohio, in 1846, it was provided that upon the fulfillment of certain conditions by the proprietors or citizens of the town of Canfield, the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the Legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill, setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the Court refused the injunction, holding that *there could be no*

contract and no irrepealable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily *public laws;* that every succeeding Legislature possesses the same jurisdiction and power as its predecessor; that the *latter have the same power of repeal and modification which the former* had of enactment—neither more nor less; that all occupy, in this respect, a footing of perfect equality; that this necessarily is so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

"The Court, treating the act as a license to the company, observed that it was deemed best, when the act was passed, for the public interest, that the improvement of the harbor should be effected by the instrumentality of a railroad corporation interested to some extent in the accomplishment of that result, and said: But if the State subsequently determined upon consideration of public policy, that this great work should not be intrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or State Constitution forbade the General Assembly of Illinois from giving effect by legislation to this change of policy. It can not be claimed that the repeal of the Act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges, although in consideration of the grant of such additional powers and privileges for which the railroad company paid nothing, it agreed to pay a certain per centum of the gross proceeds, receipts and incomes which it might derive either from the lands granted by the act, or from any improvements erected there. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purpose contemplated by the Legislature, certainly not within any given time, and could not

have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to, because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the affect of the Act of 1873 was only to remit the railroad company to the exercise of the powers, privileges, and franchises, granted in its original charter, and withdraw from it the additional powers given by the Act of 1869 for the accomplishment of certain public objects. If the act in question be treated as a mere license to the company to make the improvement in the harbor contemplated as an agency of the State, then we think the right to cancel the agency and revoke its powers is unquestionable."

It must be conceded that a lottery franchise is of a *quasi* public nature. It affects the public morals. Everywhere it is spoken of as a mere privilege or license.

In Gregory vs. Shelby College, 2 Met. 589, upon which case plaintiff in error so much relies it is said:

"The grant of a privilege to raise money by lottery is a mere gratuity; it is not an act of incorporation. It confers no chartered right, nor does it amount to a contract." True the conclusions of the Court in that case were not ,we think, in accord with its opening declarations. If no charter right existed and no contract was made then Gregory had certainly acquired no vested interest. All doubt is removed upon this point in the case of Stone vs. Mississippi, 101 U. S., 814, where the Court says:

"Lotteries as they fall clearly within the *police* power of the State may be suppressed at any time within the discretion of the Legislature. Any one who accepts a lottery charter does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when

the public good shall require, whether it be *paid for or not.* All that one can get by such a charter is a suspension of certain *governmental rights* in his *favor, subject to withdrawal at will.* He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a *permit* good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

Then it must be conceded that the original grantee obtained only a suspension of certain governmental rights in his favor subject to withdrawal at will. Subject to abrogation at any moment. Having only this license, to exist at will of the Legislature it could sell this and nothing more. The grantee could only part with that with which it was vested. The city was authorized to operate a lottery subject to the will of the Legislature and to transfer that right subject to the same power. The Legislature of Kentucky and the constitutional convention have done nothing more than repeal all lottery franchises and declare the operation of same illegal. This power the Courts have declared the Legislature had the right to exercise as a police regulation, and the Act of 1856, by specific provisions which was by the general law made a part of each lottery charter granted thereafter specifically reserved that right even if the Courts had not already determined it as a proper exercise of the police power in the absence of any specific provisions for a repeal. We contend that the plaintiff in error by his contract with Stewart under no conditions obtained a vested right further than the right to operate said lottery until terminated by the Act of the Legislature, and can not now be heard to complain that the act repealing the lottery franchises was an act impairing the obligations of a contract. He had nothing but a contingent right dependent alone

upon the will of the legislative power. In the case of Chicago, etc. vs. Iowa, 94 U. S., 155, the Court says: "Neither does it affect the case that before the power was exercised the company had pledged its income as security for the debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. *After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before.*"

The early decisions in many of the State Courts, especially Missouri and Louisiana sustained the contention of plaintiff in error, but subsequent to the decision of the case of Stone vs. Mississippi, the universal tendency has been in the other direction. For instance, in the case of Kellam vs. State, and Edwards vs. Jager, 19th Ind. 407, contracts made under lottery grants were sustained. But after the opinion in Stone vs. Mississippi, the Supreme Court of Indiana in the case of State vs. Woodward, 89 Ind., 110, overruled their former decisions saying, *inter alia*:

"Since the case of Kellum vs. State, 66 Ind., 588, was decided, the decision of the Supreme Court of the United States in the case of Stone vs. Mississippi, 101 U. S., 814, has been reported, in which the same question was involved. In that case, an act of the Legislature of Mississippi was passed in 1867, creating a corporation, giving it power to establish and conduct a lottery, to continue in existence twenty-five years. In 1869 a Constitution of the State was ratified providing, among other things that the Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery, heretofore authorized, be permitted to be drawn, or tickets therein to be sold. Subsequent legislation was provided enforcing the pro-

visions of the Constitution. It was held that the State might, in the exercise of its police power, and in the interest of public morals, take away and abrogate the lottery privilege theretofore granted, without impairing the obligation of contracts within the meaning of the Constitution of the United States. We quote the following passage from the opinion of the court in the case: 'Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He had, in legal effect, nothing more than license, to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.'"

While it is true that a number of State Courts have sustained such contracts as plaintiff in error relies upon under lottery grants similar to the one in this case, yet it is true, that most of these decisions were made at the time when the science of law and government, in the domain of police power had not by any means reached the limits of its present development. The law is a progressive science. "Governments are instituted among men for their happiness," and private interests must always yield to the public good. The demand and the necessities of the present and advancing civilization are illustrated everywhere. Private interests must give way for the public good. The Legislature can not, neither can the people surrender the right of police regulation. The future civilization ought not to be bound by the acts of the past, which deprive them of the right to self protection. No Legislature ought to have the right,

for consideration or without it, to fasten upon future society and civilization a moral leper. That a lottery is a vice goes without question. Its victims and patrons fill the almshouses, the jails and penitentiaries. There is no habit which so quickly undermines and destroys human character and blasts human hope and depraves the human heart as the gambling habit. In the years gone by the Courts have, in many States, winked at and suffered those evils, but as the morals and civilization of this country grew apace the courts everywhere have been receding from their former position, and the lotteries, like the institution of human slavery, which once boasted that it sheltered under constitutional right, will soon be blotted from the earth. And when that work is consummated the civilization of the world will have made great strides. In 1849 the framers of the Constitution of the Commonwealth of Kentucky, framed by her wisest statesmen, with jealous care placed in the "Ark of the Covenant" of that instrument, the bill of rights, these words: "The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave and its increase is the same are as inviolable as the right of the owner of any property whatever." Yet, in spite of this fervid declaration, civilization marched on, and in less than fifteen years every slave in Kentucky was a free man. And the descendants of the men who drew the foregoing declaration with equal pride and determination, in a constitutional convention, imbedded in their organic law the following words: "Slavery and involuntary servitude, in this State, are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted." And so it has always been, private interests and rights, whenever these interests and rights impeded the progress of civilization, or became a public wrong and in-

jury, have been swept away for the general public good. For years the legislative department of Kentucky, composed of the representatives from among the people, have struggled incessantly to relieve the State of the odium and disgrace of the lottery curse. But the great lottery companies, with their alert and learned counsel, always found some way to subvert the will of the people and evade the enforcement of the law. In 1891 the constitutional convention, composed of the ablest men from all the various avocations of the people of Kentucky, with frenzied zeal imbedded in the Constitution these words: "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. *All lottery privileges or charters heretofore granted are revoked.*" (Section 226, Kentucky Constitution.) This Constitution was submitted to the people for their ratification, and received a majority of 138,000.

Thus the people of the State at every forum where they could have a voice have solemnly declared against the evil of the lotteries. It is not strange. The wise and thoughtful everywhere had seen the evil winding its coils about society, demoralizing youth and manhood. Can it be possible that the people, in their sovereign power, have no right to rid their State of this moral plague? An evil which this generation, it must be conceded, had no part in creating. Were it so, it seems to us the dearest right that belongs to society, that of self protection, would be denied. As bearing upon the police power we quote the following extracts which may serve to indicate its limits:

Judge Cooley says: "The police power of a State, in a comprehensive sense, embraces its whole system of internal

regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others.

"The police power of a State is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity. It is that inherent and plenary power in a State which enables it to prohibit all things hurtful to the comfort and welfare of society." (Lakeview vs. Rose Hill Cemetery, 70 Ill., 192.)

Blackstone defines the police power to be, "The due regulation and domestic order of the kingdom, whereby the individuals of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." (4 Blackstone Com., 162.)

"It is to be observed, therefore, that the police of the government, as understood in the constitutional law of the United States, is simply the power of government to establish provisions for the enforcement of the common as well as the civil law maxim, *sic utere tuo ut alienum non laedas*. This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo ut alienum non laedas*, it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." (Tiedman's Limitation Police Power, Sect. 1.)

"With the Legislature the maxim of law, *salus populi suprema lex*, should not be disregarded. It is the great

principle on which the statutes for the security of the people is based. It is the foundation of criminal law in all governments of civilized countries and other laws conducive to the safety and subsequent happiness of the people. This power has always been exercised, and its existence can not be denied. How far the provisions of the Legislature can extend is always submitted to its discretion, providing its acts do not go beyond the great principle of securing the public safety, within well defined limits, and with discretion is imperative. All laws for the protection of lives, limbs, health and quiet of the persons, and for the security of all property within the State, fall within this general power of government." (47 Me., 189.)

"Police power is right of State or State functionary to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the Constiution."

New Orleans Gas Light Co. vs. Hart, 8 Am. State, Rep., 544.

"The police power is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the State necessary for the public welfare."

People vs. Budd, 15 Am. State Rep., 460.

"The police power of the State is the authority vested in the Legislature by the Constitution to enact all such wholesome and reasonable laws, not in conflict with the Constitution of the State or the United States, as they may deem conducive to the public good."

State vs. Moore, 17 Am. State Rep., 696.

"Police power of the State embraces its system of internal regulation by which it is sought to preserve the public order, and to prevent offenses against the State, and also to establish for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each

the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others."

People vs. Squire, 1 Am. State Rep., 893.

"The police power under our system of government has been left to the States, and the only limit to its exercise in the enactment of laws is, that they shall not prove repugnant to the provisions of the State or National Constitution."

State vs. Moore, 17 Am. State Rep., 696.

"Legislatures may, subject to constitutional limitations, prescribe just and reasonable regulations and restraints upon the use which an owner makes of his property, so as to protect the rights of the public and of others to use their property."

State vs. Yopp, 2 Am. State Rep., 305.

"The police power of the State is not confined to regulations looking to preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection."

People vs. Wagner, 24 Am. State Rep., 141.

"The State may institute any reasonable preventive remedy when the frequency of fraud, or the difficulty experienced by individuals in circumventing it, is so great that no other means will prove efficacious."

People vs. Wagner, 24 Am. State Rep., 141.

"Statutes intended to restrain or suppress manufacture and sale of oleomargarine and like compounds resembling and intended as a substitute for butter, is valid as a legitimate exercise of the police power of the State. Such legislation is justified upon the ground that the use of the inhibited compound is injurious to the public health."

Butler vs. Chambers, 1 Am. State Rep., 638.

The lottery franchise under which the plaintiff in error is asserting his claim to operate same is but a mere license

an indulgence granted by the State Government subject at any time to withdrawal and revocation. Upon this point we quote the following extracts:

"It might admit of some doubt whether the Act of 1829 grants any franchise, or constitutes any contract, either wth the commissioners therein appointed or with the turnpike corporation. It imposes certain duties on each. The Commissioners are required to use the license thus given, not for their own benefit but for a public purpose. The money procured by these proposed lotteries is to be paid over to the Fauquier and Alexander Turnpike Company, to be by them expended in the improvement and repair of the road."

Phalen vs. Virginia, 8 How[illegible]d, 166.

"The privilege to do wrong [illegible] not, it is believed, be thus purchased and fastened, like [illegible] shirt of Nessus, upon the community, without any power of getting rid of it for a quarter of a century. Such a doctrine would deprive the State of the power to right herself by repealing any reckless legislation whose tendency is to corrupt the fountain of public morals."

Moore vs. State, 48 Mississippi, 161.

"If we reverse, the inevitable result is that the associate partners enjoy an irrevocable license and monopoly to set up and carry on a lottery in this State for the term of twenty years, to end in October, 1888, and that in disregard of our present Constitution, and claimed only under the forms of an enactment which every member of this court considers to be clearly unconstitutional."

Boyd vs. The State, 53 Alabama, 615.

"We are not prepared to admit that it is competent for one Legislature, by any contract with an individual, to restrain the power of a subsequent Legislature to legislate for the public welfare, and, to that end, to suppress any and all practices tending to corrupt the public morals. (See Moore vs. The State, 48 Miss., 147; Metropolitan Board of Excise vs. Barrie, 34 N. Y., 663.)"

Boyd vs. Alabama, 94 U. S., 650.

"If this charter were granted exclusively to subserve some public purpose, as to raise means to promote common schools, it would not, within the intent of the Constitution, create a contract between the corporators and the State. But the legislative power would be complete, either to amend or abolish. The corporation would be but the instrumentality to accomplish a policy."

Miss. Society vs. Musgrove, 44 Miss., 836.

"A mere license can never contain the essence of a contract protected under the principles announced in Trustees of Dartmouth College vs. Woodward." (State vs. Norris, 77 N. C., 572; Moore vs. Mississippi, 48 Miss.; Reynolds vs. Glory, 26 Conn., 179; Tell vs. State, 42 Md., 519.)

It seems to us that the Legislature can make no contract bartering away its police powers that is binding upon future legislative bodies, neither can it authorize any one else to make such contracts. It can not surrender directly or indirectly its sovereign power to protect the health and the morals of the people.

"After an exhaustive research into the authorities upon this subject, we have been unable to find a case where a charter has been granted to deal in lotteries for a series of years that has been dignified with the name of contract, and protected by the Federal Constitution from the future legislation of the State." (Moore vs. State, 48 Miss., 160. And see Bass vs. The Mayor of Nashville, Meigs, 421; Boyd vs. Alabame, 94 U. S., 645.)

In speaking of the clause in the Constitution which forbids the passage of any law impairing the obligation of a contract, Parsons on Contracts, Third Vol., Sixth Ed., page 566, says:

"The question had also been raised, whether this clause of the Constitution limits or affects the power of the State to enact general police regulations for the preservation of

the public health and morals. Thus, if a Legislature grant a charter to a corporation to hold land for the purpose of burying the dead within the limits of a city, can a subsequent Legislature, for the purpose of preserving the health of the city, prohibit all persons from burying the dead within the limits of the city, and by this prohibition render their former grant useless and inoperative? Or can a Legislature, having authorized an individual or a company to raise a certain sum of money by lotteries, or after having licensed individuals to sell spirituous liquors for a certain period, afterwards, for the purpose of preserving the public morals recall such authority or license, by a general law prohibiting lotteries or the sale of spirituous liquors? And if this can be done where the grant or license was gratuitous, can it also be done if a certain price or premium was paid for it? While the authorities are not uniform, we consider the prevailing adjudication of this country to favor the rule, that such general laws are not in either case within the purview or prohibition of the Constitution."

Judge Cooley, in his work on Constitutional Limitations, 4th Edition, page 341, says: "Perhaps the most interesting question which arises in this discussion is, whether it is competent for the Legislature to so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction; whether, for instance, it can agree that it will not exercise the power of taxation or the police power of the State, or the right of eminent domain as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle, that the Legislature can not diminish the power of its successors by irrepealable legislation, and that any other rule might cripple and eventually destroy the government itself. If the Legislature has power to do this, it is certainly a very dangerous power, exceedingly liable to

abuse, and may possibly come in time to make the constitutional provisions in question as prolific of evil as it ever has been, or is likely to be of good."

And again, Judge Cooley says: "Franchises, like every other thing of value, and in the nature of property, within the State, are subject to this power; and any of their incidents may be taken away, altogether annihilated by means of its exercise." Page 343.

Bearing upon the connection between the police power and public morals, Justice Bradley said in Beer Company vs. Mass. 97 U. S., 33. "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, *and the preservation of good order and public morals.* The Legislature can not, by any contract, divest itself of the power to provide for these objects which demand the application of the maxim *salus populi suprema lex;* and they are to be obtained and provided for by such appropriate means as the legislative discretion may devise."

The defendant in error, also contends that the Act of 1872 allowing the council of the city of Frankfort to sell its lottery franchise, did not authorize its vendee to subsequently sell the same. A second sale was not authorized. A lease is assignable of common right, and its assignment could only be restrained by a specific provision, but a lottery franchise is a violation of common right, and is therefore not assignable unless in pursuance of a statute. Hence, Douglas acquired no vested interest in the franchise.

The terms of the contract under which the plaintiff in error claims, provides for the contingency of legislative or judicial interference, and seems to recognize and anticipate

legislative interference. This is shown by the following clause from the contract as admitted by the plaintiff in error: "It is agreed, however, that in the event the said party of the second part, his heirs or assigns, are at any time prevented or hindered from drawing said lottery or any class or classes thereof in this State by judicial or legislative proceedings, he shall not be required to pay any installment falling due during the time in which he may be so prevented or hindered until such prevention or hinderance is removed: Provided, that the party of the second part shall by notice in writing, served upon the mayor of the city of Frankfort, notify the parties of the first part of the date of the commencement of any such interference when the time of the computing of the interference shall commence from the date of said service of such notice and continue only so long as such prevention or hinderance as aforesaid shall actually exist. And it shall be the duty of the party of the second part to notify, in writing, the parties of the first part of the removal or cessation of such prevention or hinderance immediately thereon: And provided further, in case of any such interference as aforesaid, the actual time of the duration of such hinderance or prevention shall not be computed in the drawings of the classes aforesaid, if no such drawings are in fact made during said time, and all of said payments hereinbefore enumerated which shall fall due after the commencement of such interferences shall be respectfully postponed for the same length of time of said interference, and become due and payable accordingly."

Hence, we must conclude that the vendor of plaintiff in error recognized the right of the Legislature to revoke the franchise, for that reason protected himself from loss by the terms of the foregoing contract. He was dealing in a business that affected public morals, a license emanating from

the government—an indulgence in violation of common right —subject to revocation at the will of the Legislature. As said by Mr. Chief Justice Waite, he must have known that "no Legislature can bargain away the public health or the public morals—the people themselves can not do it, much less their servants."

We respectfully submit that the judgment of the Court of Appeals ought to be affirmed.

WM. GOEBEL,
of Counsel.

W. S. TAYLOR,
Attorney General.

DOUGLAS *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 10. Argued October 12, 13, 1897. — Decided November 29, 1897.

By the constitution of Kentucky of 1891 it is provided that "lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this act by proper penalties. All lottery privileges or charters heretofore granted are revoked." *Held*,

(1) That the provision when applied to a previously existing lottery grant in the State of Kentucky was not inconsistent with the contract clause of the Constitution of the United States;

(2) That a lottery grant is not, in any sense, a contract within the meaning of the Constitution, but is simply a gratuity and license, which the State, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery; and that no right acquired during the life of the grant, on the faith of or by agreement with the grantee, can be exercised after the revocation of the grant and the forbidding of the lottery, if its exercise involves a continuance of such lottery;

(3) That all rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the State to the extent just indicated: nevertheless, rights acquired under a lottery grant, consistently with existing law, and which may be exercised and enjoyed without conducting a lottery forbidden by the State are, of course, not affected, and could not be affected, by the revocation of such grant;

(4) That this court when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment.

THE case is stated in the opinion.

Mr. D. W. Sanders and *Mr. John G. Carlisle* for plaintiff in error. *Mr. Aaron Kohn* was on their brief.

Mr. W. S. Taylor, Attorney General of the State of Kentucky, for defendant in error. *Mr. William Goebel* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

By section 226 of the constitution of Kentucky of 1891 it is provided that "lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

By joint resolution of the General Assembly passed January 30, 1892, the Attorney General of that Commonwealth

was directed, in execution of this constitutional provision, to immediately institute and prosecute such legal proceedings as might be necessary to suppress or revoke all lotteries or lottery franchises, privileges or charters operated in Kentucky.

In conformity with that resolution the present action was instituted in the Louisville Law and Equity Court. The petition charged that the defendants were exercising in the city of Louisville, Kentucky, and elsewhere, without lawful warrant, the right, privilege and franchise to operate a lottery. The relief asked was a judgment preventing the exercise by the defendants of such lottery franchise.

The defendant Douglas in his answer set out numerous acts of legislation under the authority of which he claimed the right to conduct the lottery in question. He insisted that the statutory and constitutional provisions invoked in support of the action were repugnant to the clause of the Constitution of the United States prohibiting any State from passing a law impairing the obligation of contracts.

The defence was sustained by the court of original jurisdiction, which overruled a demurrer to the answer; and the Commonwealth having declined to plead further, its petition was dismissed. That judgment was reversed by the Court of Appeals of Kentucky, and the validity of the above constitutional provision relating to lotteries, and as applied to the defendant's claim of a lottery privilege, was adjudged not to be repugnant to the Constitution of the United States.

The case is here upon writ of error sued out by Douglas, who claims that by the final judgment of the highest court of Kentucky he has been denied a right and immunity secured to him by the Constitution of the United States.

It appears that under authority conferred by various legislative enactments which need not be specially set forth, the Mayor and Board of Councilmen of the city of Frankfort, a municipal corporation of Kentucky, made, December 31, 1875, a written agreement with one E. S. Stewart, whereby that city sold, conveyed and assigned to him a scheme of lottery composed of 30,900 classes which it had devised, not more than two of which were to be drawn on each day, Sundays ex-

cepted, until the whole number should have been fully drawn; Stewart to have the right to control and operate such scheme in accordance with the provisions of the acts under which the city proceeded. The agreement provided that, in consideration of the above sale, assignment and transfer, Stewart should pay to the city of Frankfort various sums of money at stated times. As required by the agreement, and in conformity with the acts of Assembly, he executed to the Commonwealth a bond in the penal sum of one hundred thousand dollars, conditioned for a faithful compliance with the provisions of those acts, and for the payment of all sums stipulated to be paid to the city of Frankfort, as well as all prizes drawn in any class under said lottery scheme.

By an act approved March 22, 1890, the General Assembly of Kentucky repealed the charter of the Frankfort lottery. Acts, Ky. 1889–90, c. 391, vol. 1, pp. 42, 43. But Stewart had died before the passage of that act, and by contract with his wife, as sole legatee and devisee of his estate, Douglas acquired the right to operate the lottery scheme that had been acquired by Stewart.

It is stated in the answer — and as this case was determined upon demurrer to the answer, it must be assumed in the present action to be true — that Stewart and Douglas fully complied with all the provisions of the above contract, paid all instalments due the city of Frankfort as the same became payable, fully performed every condition of his contract and bond, and was ready and willing to carry out the same according to the terms, stipulations and covenants thereof.

The answer further averred that on the 11th day of September, 1878, the Court of Appeals of Kentucky, in the case of *Webb* v. *The Commonwealth of Kentucky* — brought to enjoin the exercise of the privileges of a lottery grant — adjudged that the sale of a lottery franchise, under the authority of the State, vested in the vendee a property right to conduct such lottery in accordance with the terms of his contract, which could not be repealed by the legislature of the State, and held section 6 of article 21, chapter 28, of the Revised Statutes attempting such repeal to be void so far as it affected the

rights of the purchaser under a contract made before the passage of the act.

The answer also contained the following averments: "Defendant says that he has a vested right to conduct the lottery business by drawing the classes contained in the scheme which the city of Frankfort sold and conveyed to E. S. Stewart under the terms, conditions and covenants of the contract of December 31, 1875, executed and delivered as aforesaid, and that there has never been at any time more than two classes in said scheme drawn in one day, and there are a large number of classes in said scheme yet to be drawn; that his said right under his said contract was authorized and approved by the Commonwealth of Kentucky, repeatedly adjudged valid by the judicial tribunals of this State, and such right has always been held by the courts of this State inviolable and not subject to repeal, alteration or modification by subsequent legislatures. Defendant says that he has paid large sums of money for said scheme devised as aforesaid and said contract, and has made contracts and incurred liabilities involving large sums of money upon the faith of said contract, and relying upon the terms thereof and upon the decisions of the courts of the State adjudging said contract to be valid, obligatory and inviolable."

In support of the contention that the contracts for the purchase of the lottery scheme in question were valid and irrepealable, the defendant in his answer referred to an act of the General Assembly approved May 17, 1886, declaring that "every corporation or person to whom a lottery franchise has been granted by the General Assembly of this Commonwealth, and which franchise has been declared by a judgment of the Court of Appeals to be a lawful and existing one, or the lawful grantee, alienee, legatee or assignee of such franchise, shall be authorized to operate and conduct a lottery in this Commonwealth when he, she or it shall have filed with the Auditor of Public Accounts a certified copy of the judgment rendered, and the opinion delivered by the Court of Appeals in a case heard and determined before it, in which it has determined that a lottery could be lawfully operated under said

grant from the General Assembly of this Commonwealth, and obtain from the said auditor a license, (which is hereby authorized and directed to issue on the filing of said copies hereinbefore required,) reciting the filing of said copies, and authorizing the operation of said lottery for one year from the date thereof, on the condition that said licensee shall, within five days thereafter, pay to the said auditor of the State the sum of $2000; and said license issued by said auditor, as hereinbefore directed, and any and all renewals thereof, as hereinafter provided for, shall be conclusive evidence in all the courts of this Commonwealth of the rights of the licensee to operate a lottery for the period therein named, etc."

Under that statute the defendant obtained a license from the Auditor of Public Accounts, from year to year, and paid to the State $2000 annually every year since the passage of that act.

The answer also stated: "And the General Assembly of Kentucky, further recognizing the property rights of this defendant under his said contract, by an act of the General Assembly of the State approved May 12, 1884, enacted that the general council of the city of Louisville should by ordinance provide the payment of $200 per annum for every lottery office or agency therefor in the city of Louisville, which ordinance was accordingly passed by the general council of the city of Louisville and is now a valid and existing law, and this defendant has paid the city of Louisville $200 for each office operated by him, and at the time of the institution of this suit had paid the city of Louisville the sum of $200 for each office he then operated in advance for one year from the time of the issue of the license, and that the said licenses thus obtained have not yet expired."

The defendant, in addition, pleaded *res judicata* in respect of the matters involved in this action. This defence is thus set forth: "The defendant further states that after the making of the contract between the city of Frankfort and said E. S. Stewart, as set forth in the second paragraph hereof, the Commonwealth of Kentucky, by her attorney general,

filed a petition in the Franklin Circuit Court against the city of Frankfort, the said E. S. Stewart and others, in the nature of a writ of *quo warranto*, alleging in said petition that the said E. S. Stewart and others claiming under him were selling lottery tickets under the said grant, claiming under the contract referred to in the second paragraph herein; and further alleged that the said board of councilmen of the city of Frankfort had no title to said lottery franchise and had no authority to sell and convey the scheme as set forth in said contract, and that the defendants in said action were engaged in selling tickets under said contract in violation of law, and that the exercise of the privileges by them was injurious to public morals by tempting the people into the immoral habit of gaming, and that the said defendants were usurping the franchise, all of which matters and things are now relied upon in this action and are the identical matters for which relief is sought in this case, and that by the said petition the plaintiffs herein sought in said action to enjoin and oust the defendants therein from proceeding further to sell tickets and operate the lottery privileges claimed by them, which are the identical rights claimed herein, and the court was asked to hold the said franchise void and to annul and adjudge as cancelled all rights of the defendants therein; that said defendants filed their answer in said case and joined issue upon the allegations of the said petition; that thereafter, upon motion of the Commonwealth of Kentucky, the said action was transferred from the Franklin Circuit Court to the Oldham Circuit Court; that in the said case such proceedings were had that the court finally entered a judgment declaring that under the act of March 16, 1869, referred to in paragraph 2 hereof, the city of Frankfort and the board of councilmen of said city did obtain the legal title to said lottery franchise and the classes thereof; and, further, that the said city of Frankfort, under the act of March 28, 1872, referred to in paragraph 2, were authorized to sell and dispose of said scheme upon such terms as they deemed proper, and that said act was constitutionally valid and binding and authorized such sale and transfer, and that the contract made between the city of Frankfort and the said E. S.

Stewart, which is the same contract relied upon herein, was a valid and subsisting obligation and enforceable as a legal obligation. From said judgment of the Oldham Circuit Court the Commonwealth of Kentucky prayed an appeal to the Court of Appeals of Kentucky, and the said Court of Appeals of Kentucky, on the 27th day of February, 1878, entered a judgment affirming the judgment of the Oldham Circuit Court, and adjudged in said action that the General Assembly of the Commonwealth of Kentucky, by the act of March 16, 1869, did confer upon the board of councilmen of the city of Frankfort the said lottery franchise, and that the said act was valid, and that the city of Frankfort, by reason thereof, was the owner of the scheme named in the contract referred to, and that under the act of March 28, 1872, the city of Frankfort had the legal right to sell and dispose of the same upon such terms and conditions as it deemed proper, and that the said sale to the said E. S. Stewart and the contract in relation thereto was binding and valid and had been entered into in strict conformity with the said acts of the General Assembly. A copy of the pleadings in said case and the opinions and judgments of said courts will be filed herewith as a part hereof. The defendant says that by reason of the proceedings in said action and the judgment of the courts thereupon, the plaintiff is barred from bringing or maintaining this action; that the legality of the act of March 28, 1872, and the validity of the contract of E. S. Stewart with the city of Frankfort are matters *res judicata* by reason of said judgment, and he pleads and relies upon the same herein."

The Federal question presented for our determination arises upon the claim of the plaintiff in error — which was denied by the final judgment of the highest court of Kentucky — that the agreement between the city of Frankfort and E. S. Stewart, by which the latter became the owner of the lottery scheme devised by that city, under the authority of law, was a contract the obligation of which the State was forbidden by the Constitution of the United States to impair either by legislative enactment or by constitutional provision.

If this interpretation of the Federal Constitution be correct,

it will follow that any provision in the constitution or in the statutes of Kentucky forbidding lotteries and gift enterprises in that Commonwealth, and revoking the lottery privileges or charters theretofore granted, is null and void as to the defendant Douglas, who succeeded to the rights acquired by Stewart under the agreement of 1875 with the city of Frankfort. This necessarily results from the declaration that the Constitution of the United Sates is the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous when placed in contrast with the wide spread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple. *Phalen* v. *Virginia*, 8 How. 163.

Is a State forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lottery?

These questions arose and were determined, upon much consideration, in *Stone* v. *Mississippi*, 101 U. S. 814, 819, 821.

It will be seen from the report of that case that the legislature of Mississippi chartered the Mississippi Agricultural, Educational and Manufacturing Aid Society, with authority to raise money by way of lottery; and in consideration thereof the society paid $5000 into the treasury of the State, and agreed to pay, and did pay, an annual tax of $1000, together with one half of one per cent, on the amount of receipts derived from the sale of certificates. While the Society's charter was in force, the State adopted a new constitution, declaring that the legislature should never authorize a lottery, nor should the sale of lottery tickets be allowed, nor any lottery theretofore authorized be permitted to be drawn or tickets

therein be sold. This was followed by the passage of an act prohibiting lotteries, and making it unlawful to conduct one in the State. The question was then raised by an information in the nature of *quo warranto*, whether the lottery privilege given by the Society's charter could be withdrawn or impaired by the state legislation — that Society having, as was conceded, complied with all the conditions upon which its charter was granted. The Supreme Court of Mississippi held that the State could withdraw the lottery privilege which it had granted. And that conclusion was questioned upon writ of error sued out from this court.

Chief Justice Waite, who delivered the unanimous judgment of the court in that case, said: "The question is therefore directly presented, whether in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." Again, referring to lotteries: "They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may

resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

It is suggested that, in important particulars, the opinion and judgment in *Stone* v. *Mississippi* was modified by the decision in *New Orleans* v. *Houston*, 119 U. S. 265, 275. So far from this being true the principles announced in the former case were recognized, and held to have no application in the latter case. In *New Orleans* v. *Houston* the question was whether the legislature of Louisiana could destroy or impair a lottery charter granted and authorized by the constitution of that State. This court, speaking by Mr. Justice Matthews, said: "It is undoubtedly true that no rights of contract are or can be vested under this constitutional provision which a subsequent constitution might not destroy without impairing the obligation of a contract, within the sense of the Constitution of the United States, for the reason assigned in the case of *Stone* v. *Mississippi*. But an ordinary act of legislation cannot have that effect, because the constitutional provision has withdrawn from the scope of the police power of the State, to be exercised by the General Assembly, the subject-matter of the granting of lottery charters, so far as the Louisiana State Lottery Company is concerned, and any act of the legislature contrary to this prohibition is upon familiar principles null and void. The subject is not within the jurisdiction of the police power of the State, as it is permitted to be exercised by the legislature under the constitution of the State." So that in *New Orleans* v. *Houston* it was decided, that, while a lottery grant was not a contract within the meaning of the Federal Constitution, the obligation of which was protected against impairment by the State making the grant, the legislature could not strike

down a lottery which the fundamental law of the State had authorized.

In the argument on behalf of the plaintiff in error much stress was laid upon former decisions of the Court of Appeals of Kentucky relating to rights acquired under lottery grants. Our attention has been particularly called to *Gregory* v. *Shelby College Lottery Trustees*, 2 Met. (Ky.) 589, 598. From the report of that case it appears that the legislature of Kentucky in 1838 granted to Shelby College the privilege of raising the sum of one hundred thousand dollars by lottery, with authority to sell or dispose of the scheme or any classes of the lottery. In 1855 the provision of the Revised Statutes, declaring that all lottery privileges should cease, took effect. And the question arose as to the effect of that enactment upon the rights of one who had loaned money to the College upon the faith of the lottery grant, and to secure the loan had taken from the trustees of the institution a mortgage upon their rights under the lottery franchise. The Court of Appeals of Kentucky, conceding that the grant of a privilege to raise money by a lottery was a mere gratuity, was not an act of incorporation, conferred no charter rights, and did not amount to a contract, proceeded: "Although, therefore, the legislature has the power to repeal the grant of a lottery privilege where no rights have accrued under it, and though lotteries have a demoralizing tendency and exercise a very pernicious influence over the ignorant and credulous part of the community, and for this reason have been almost universally denounced by the law-making power in different States of the Union, yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be divested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant before the passage of the repealing law, then, to the extent of such rights at least, the law must be regarded as unconstitutional and inoperative. This conclusion is, we think, fully sanctioned by the following adjudged cases: *Dartmouth College* v. *Woodward*, 4 Wheat. 518 to 643; *Fletcher* v.

Peck, 9 Cranch, 87; *University of Maryland* v. *Williams*, 9 Gill & Johnson, 365; *Terret* v. *Taylor*, 9 Cranch, 43, 52; *Louisville* v. *University of Louisville*, 15 B. Mon. 642, 692. The plaintiff, Waller, before the repealing act was passed, had, on the faith of the lottery grant, advanced large sums of money, which were appropriated by him for the benefit of Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. As the lottery privilege was granted for the benefit of the Shelby College, and the money was advanced by Waller with the assent of the trustees of the college, under the belief that it would be realized eventually from the lottery, he became thereby invested with the right to the use of the grant until from such use the sum was produced which he had advanced for the benefit of the college. This was a vested right of which he could not be divested by an act of the legislature. So far, therefore, as the repealing act interferes with or affects this right, it is unconstitutional and inoperative." These principles were recognized in cases subsequently decided by the same court.

The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according to the law of the State as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the State seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the Federal Constitution. This contention is disputed by the State. So that the issue presented makes it necessary to inquire whether that which the defendant asserts to be a contract was a contract of the class to which the Constitution of the United States refers. This court must determine — indeed, it cannot consistently with its duty refuse

to determine — upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation.

In *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, which involved the contract clause of the Constitution, it was contended that this court should accept as conclusive the interpretation placed by the Supreme Court of Ohio upon the constitution and laws of that State as affecting certain state legislation which, it was alleged, constituted a contract, the obligation of which could not be impaired by legislation. Mr. Justice Wayne, delivering the unanimous judgment of the court, said: "The constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, 'though they have been made in forms of law,' or by the instrumentality of a State's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the Constitution of the

United States follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a State, by its authority."

The doctrine that this court possesses paramount authority when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416, 452; *Wright* v. *Nagle*, 101 U. S. 791, 794; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg, Shreveport, &c. Railroad* v. *Dennis*, 116 U. S. 665, 667; *N. O. Waterworks Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 36; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 493; *Bacon* v. *Texas*, 163 U. S. 207, 219.

In view of these adjudications it is clear that we are not required to accept as authoritative in this case the decision of the Court of Appeals of Kentucky in *Gregory* v. *Shelby College Lottery Trustees*, above cited, to the effect that a legislative revocation of a lottery grant is a violation of the Constitution of the United States so far as such revocation affects rights acquired on the faith of the privilege conferred by the grant, and the exercise of which involves the continuance of that privilege for such time as may be necessary for the full enjoyment of those rights. On the contrary, we hold that a lottery grant is not, in any sense, a contract within the meaning of the Constitution of the United States, but is simply a gratuity and license, which the State, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery; and that no right acquired during the life of the grant, on the

faith of or by agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, *if its exercise involves a continuance of the lottery as originally authorized.* All rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the State to the extent just indicated; nevertheless, rights acquired under such a grant consistently with the law as it was when they were so acquired, and which rights may be exercised and enjoyed without conducting a lottery forbidden by the State, are, of course, not affected, and could not be affected, by the revocation of such grant. Here the defendant insists that as the agreement under which Stewart became the owner of the Frankfort lottery scheme was lawful when made, he, as assignee of Stewart, is protected by the Constitution of the United States in carrying on that lottery, despite the prohibition of all lotteries and the revocation of all lottery grants by the present constitution of Kentucky adopted after the transfer to Stewart of the benefit of that scheme. For the reasons stated, this contention must be overruled. It could not be sustained without overruling *Stone* v. *Mississippi*, which we have no inclination to do.

Some stress has been laid by counsel upon the fact that, in an action brought by the State in the nature of *quo warranto* against the city of Frankfort, and which was determined upon appeal by the Court of Appeals of Kentucky on the 27th day of February, 1878, it was adjudged that the contract between that city and Stewart was a valid and binding contract; and, consequently, the State is barred, upon the principle of *res judicata*, from maintaining the present action. The opinion in that case has not been published in the regular reports, but a copy of it appears in the record. It is sufficient, in answer to the contention of the defendant, to say that the case referred to, as appears from the opinion of the state court, involved nothing more than the validity of the agreement of 1875 between the city of Frankfort and Stewart, under the law as it was when such agreement was made, and did not necessarily involve any inquiry as to the power of the State, by legislative or constitutional provision, and without violating

the clause of the Constitution of the United States prohibiting the passage of state laws impairing the obligation of contracts, to revoke an existing lottery grant and prohibit all lotteries within its limits. The thing adjudged in the case referred to fully appears from the statement made by the Court of Appeals of Kentucky of the conclusion which it reached, namely: "We therefore conclude that the legislature of 1869 conferred on the board of councilmen of the city of Frankfort franchises, powers and authority equal or exactly similar to those that had by the act of 1838 been conferred on the managers, which include the privilege of raising one hundred thousand dollars by operating a lottery." A decision that the agreement between the city of Frankfort and Stewart was, when made, valid under the laws of Kentucky, did not determine, as between the State and those asserting rights under that agreement, that the State could not, by subsequent legislative enactment or by constitutional provision, and so far as the Constitution of the United States was concerned, prohibit all lotteries, and thereby prevent the exercise by those asserting the right under or by virtue of that agreement, to carry on a lottery against the expressed will of the State.

We have felt some embarrassment arising from the conflict between the present decision and the former decisions of the highest court of Kentucky upon the general subject of lotteries, and as to the power of the State, by contract, to so tie its hands that it may not revoke, in its discretion, grants of lottery privileges and prohibit the carrying on of all lotteries. But that embarrassment has been greatly lessened by the fact that that court, in its opinion in the present case, after referring to *Stone* v. *Mississippi*, said: "It seems to us that this decision defining the provision of the Federal Constitution as to what subjects are contracts and protected by it, and that lottery grants, though paid for, are not protected by said provision, is binding upon this court, and has the effect to overrule its decisions holding the contrary view. But apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between

the contractual and governmental power of the States, to wit, that the provisions of the Federal Constitution in reference to contracts only inhibits the States from passing laws impairing the obligations of such contracts as relate to property rights, but not to subjects that are purely governmental." In the same opinion it is well observed that, under any other doctrine than that announced in *Stone* v. *Mississippi*, the legislature, by giving or bartering away the power to guard and protect the public morals, could "convert the State into dens of bawdy houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals and good order of the State would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government."

We perceive no error in the judgment of the Court of Appeals of Kentucky, and it is

Affirmed.

MR. JUSTICE SHIRAS agrees that the judgment should be affirmed, but does not concur in all the reasoning of this court.